84-495

NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH,
H. ARNOLD MULLER,
HELLEN B. O'BANNON,
MICHAEL J. BROWNE,
WILLIAM R. DAVIS,
LEROY S. ZIMMERMAN, personally and in their official capacities,
and JOSEPH A. SMYTH, JR.,
personally and in his official capacity,
together with all others similarly situated,

Appellants

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M. D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D. O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees

On Appeal From the United States
Court of Appeals For The Third Circuit

JURISDICTIONAL STATEMENT

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31 pp

QUESTIONS PRESENTED

1. Whether a court of appeals properly may declare provisions of state law unconstitutional on appeal from a district court's disposition of a motion for preliminary injunction.

2. Whether the court of appeals misapplied the precedents of this Court in declaring unconstitutional numerous provisions of Pennsylvania's Abortion Control Act.

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No. 84-

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Appellees

On Appeal From The United States
Court of Appeals For The Third Circuit

The Attorney General of the Commonwealth

of Pennsylvania, on behalf of

the appellants named above,

hereby appeals from the judgment

of the court of appeals entered in this case.

OPINIONS BELOW

The opinion of the court of appeals, including the statements dissenting from the denial of rehearing in banc (App.[1] 3a - 173a), is reported at 737 F.2d 283. The opinion of the district court (App. 174a - 272a) is reported at 552 F.Supp. 791.

JURISDICTION

The judgment of the court of appeals (App. 153a - 154a) holding unconstitutional 18 Pa. Cons. Stat. §§3205, 3206, 3208, 3210(b) and (c), 3211 and 3214(a),(b) and (h) was entered on May 31, 1984. A timely petition for rehearing in banc was denied by order entered on June 28, 1984. App. 155a - 156a. A notice of appeal to this Court (App. 1a - 2a) was filed on September 17, 1984.

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[1]"App." refers to the appendix to this jurisdictional statement.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Pennsylvania statute at issue here are reproduced as an appendix to the opinion of the court of appeals (App. 90a - 132a) and in the appendix to this jurisdictional statement. App. 279a.

STATEMENT

This is an appeal from a judgment of the United States Court of Appeals for the Third Circuit in which the court, in the course of reviewing a district court decision denying almost entirely a preliminary injunction,[2] held unconstitutional numerous provisions of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983) (hereinafter "the Act" or "the Pennsylvania Act"). Among the provisions stricken by the court of appeals were those dealing with informed consent (Section 3205), parental consent or judicial approval for minors (Section 3206), printed information (Section 3208), abortions after viability (Section 3210(b, and (c)), and reporting requirements for abortion providers (Sections 3211(c) and 3214(a)(b) and (h)).[3]

Proceedings were commenced in the United States District Court for the Eastern District of Pennsylvania on October 2, 1982, when the appellees[4] filed an action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 in which they alleged that the Act in its entirety violated various consti-

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[2]The district court preliminarily enjoined only the requirement that 24 hours expire between the time a woman receives certain specified information and performance of the abortion, 18 Pa. Cons. Stat. Ann. §3205(a). (App. 270a).

[3]The court of appeals also struck down Section 3215(e) relating to coverage for abortion in insurance policies. Appellants are not appealing that ruling at this time.

[4]The plaintiffs below (appellees in this Court) were the American College of Obstetricians and Gynecologists, Pennsylvania Section, individual physicians who perform abortions, abortion clinics, clergymen and one woman who desires to purchase comprehensive health insurance.

tutional provisions.[5] With the Act scheduled to go into effect on December 8, 1982, appellees filed a motion for preliminary injunction on October 29, 1982. On November 18, 1982, the district court ordered the parties, solely for purposes of a preliminary injunction hearing to be held on December 2, to submit by November 30 a stipulation of uncontested facts; a comprehensive statement of contested facts, with the proviso that "no party may contest a fact unless it is prepared to present evidence regarding that fact

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[5]Named as defendants below (appellants here) were Governor Thornburgh, Health Secretary Muller, Public Welfare Secretary O'Bannon, Insurance Commissioner Browne, Commonwealth Secretary Davis, Attorney General Zimmerman and Montgomery County District Attorney Smyth. Defendants Thornburgh and O'Bannon filed a motion to dismiss themselves as defendants. Appellees stipulated to the dismissal of Thornburgh, but the district court has issued no order on the motion to dismiss O'Bannon.

at the preliminary injunction hearing"; and, a list of witnesses, together with a brief statement of the testimony to be preserted by each witness. App. 274a - 278a.

In view of the brief time available to prepare for the hearing and to meet the requirements of the judge's order outlined above, the parties agreed to a stipulation of facts solely for purposes of the motion for preliminary injunction. See App. 176a, n.1. At the hearing on December 2 no testimony was presented. App. 177a.

Following the district court's December 7 order denying almost entirely the preliminary injunction, on December 9 the court of appeals, on motion of appellees, enjoined enforcement of the entire Act pending appeal. After

argument and reargument of the appeals, on May 31, 1984,[6] the court of appeals, in a split decision, held that numerous provisions of the Act were unconstitutional. A petition for rehearing in banc was denied on June 28, 1984, with four judges dissenting.

In her majority opinion for the court Judge Sloviter held first that, although the appeal was from a preliminary injunction order, "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields

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[6]After expedited briefing and argument, the court of appeals ordered that the appeal be held pending decisions by this Court in City of Akron v. Akron Center for Reproductive Health, Inc. Nos. 81-746 and 1172; Planned Parenthood Assn. of Kansas City, Mos., Inc. v. Ashcroft, Nos. 81-1255 and 1623; and, Simopolous v. Virginia, No. 81-185, which were then pending before this Court. Following decisions in those cases on June 15, 1983, the court of appeals ordered that supplemental briefs be filed and reargument was held on November 21, 1983.

to our plenary scope of review as to the applicable law." App. 21a. The majority then proceeded to hold unconstitutional eight provisions of the Act. Chief Judge Seitz dissented in part, disagreeing with the majority's holdings of unconstitutionality as to Sections 3205(a)(2); 3208; 3210(c); 3211; and, 3214(a),(b) and (h). App. 132a - 152a.

The Questions Are Substantial

The court of appeals has declared unconstitutional numerous significant provisions of Pennsylvania's Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983), and has also suggested to the appellees additional arguments which may, in the court's view, render other provisions of the Act vulnerable to attack.[7] These rulings are incorrect in light of precedents from this Court, many of which are of recent origin. More fundamentally, however, the decision of the court of appeals majority is a stark example of judicial excess which calls out for this Court's correction.

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[7]For examples of the majority's improper reaching out for issues and claims not raised by the appellees see Chief Judge Seitz's partial dissent at App. 141a - 143a, 146a.

1. Until now we had thought it well-settled that the question before the court on a motion for preliminary injunction is whether the plaintiff has demonstrated "that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits," Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); the question on appeal then is whether the trial court abused its discretion in granting or denying the motion. Id., at 932. As this Court has held squarely, it is beyond a court's province when examining a preliminary injunction motion to declare a statute unconstitutional. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940); see also Withrow v. Larkin, 421 U.S. 35, 43 (1975).

Quite obviously, the court of appeals here, in declaring numerous

provisions of state law unconstitutional in the course of examining a district court's ruling on a motion for preliminary injunction, has violated in as blatant a manner as possible the permissible scope of its review as prescribed in Doran and Mayo. As if this immoderation were not enough, the court of appeals majority, veiling only thinly its distaste for the subject matter of this legislation[8], offered

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[8]For example, in the majority opinion, the court of appeals felt compelled to note that "[w]e may not inquire as to whether the Pennsylvania legislature's intent [unexpressed] to restrict a pregnant woman's fundamental right to choose an abortion was so 'fundamental an inducement' as to invalidate the entire Act . . . ." App. 31a. (citation omitted); and, to "overlook [ ] what may reasonably be deemed to be a pervasive invalid intent." App. 32a. In its conclusion, the court's majority also chided the legislature for passing a statute "which it had been advised skirted constitutional limits." App. 86a.

hints to the appellees as to how they might successfully mount further challenges in the district court.[9]

The court of appeals' reliance on what it termed "an unusually complete factual record" (App. 21a) was misplaced. This Court again has squarely held that an appellate court reviewing a preliminary injunction ruling should "intimate no view as to the ultimate merits" of the case

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9 For example, the court's majority upheld Sections 3207(b) (Abortion Facilities, Reports) and 3210(a) (Abortion After Viability, Prohibition), but opined that these provisions would be invalid if only the appellees can produce evidence that physicians will be "chilled" by their provisions. App. 57a, 58a, 68a. As Chief Judge Seitz correctly noted in his partial dissent, the very purpose of a statute of this sort is to "chill" illegal conduct. App. 146a. The majority's unprecedented suggestions to appellees improperly constrain appellants' ability to defend these provisions at trial. We request, therefore, that in the course of reviewing this appeal, the Court express disapproval of these uncalled for, and erroneous, hints.

precisely because the litigants have "a limited time . . . to assemble evidence and prepare their arguments." Brown v. Chote, 411 U.S. 452, 457 (1973). In fact, as we detailed earlier, supra p. 6 - 7, appellants were constrained to comply with the district court's order to assemble their proof within about two weeks and to not contest any fact unless prepared to offer testimony in rebuttal. App. 274a -278a. While the district court's order may have been necessary under the circumstances, the concessions it forced appellants to make should not bind them on the ultimate disposition of the cause. Indeed, the district court's procedural order, the stipulations of fact and the court's ruling were carefully limited to the preliminary injunction motion. App. 274a - 278a, 176a, n.1.

Unquestionably, the court of

appeals' disposition of this case seriously prejudices appellants' ability to defend at a final hearing the constitutionality of the provisions deemed invalid by the court. The district court is bound by those rulings and might even deny appellants the opportunity to offer evidence supporting the validity of these now-stricken sections of the statute. Entirely aside from the court's errors in its constitutional analysis, which we highlight below, the decision of the court of appeals to reach out far beyond the scope of its review presents substantial and important questions meriting this Court's review.[10]

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[10]In light of the court of appeals' obvious error in determining the scope of its review, the court may wish to consider summary reversal on this ground alone.

2. In Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, No. 81-185 (June 15, 1983), the Court upheld a statute which, like Section 3210(c) of the Pennsylvania Act, requires the attendance of a second physician during post-viability abortions. As Chief Judge Seitz noted in his partial dissenting opinion below (App. 144a), the Pennsylvania statute is constitutional under Ashcroft.

There was in Ashcroft no single opinion representing the views of a majority of the court on Missouri's second physician requirement. Justice Powell, in an opinion joined by the Chief Justice, concluded that a second physician requirement is constitutional if the statute provides an exception to the requirement for medical emergencies. Slip op. at 8, n. 8.

Although the Missouri statute contained "no clearly expressed exception on the face of the statute for medical emergencies," Justice Powell construed statutory language qualifying the physician's duty to the child by providing that his action "not pose an increased risk to the life or health of the woman" as an exception for medical emergencies. Ibid. The three remaining Justices who approved of the second physician requirement apparently found no need for a medical emergency exception. Opinion of Justice O'Connor, Slip op., at 2.[11] Thus in light of

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[11]Four Justices, in an opinion authored by Justice Blackmun, concluded that a second physician provision was invalid generally and because the medical emergency exception was not express. Slip op. at 6-10.

Ashcroft, a second physician requirement is constitutional if it provides, although perhaps not expressly, that the requirement is not intended to put the pregnant woman's life or health at risk.

Pennsylvania's statute clearly meets these requirements. In terms far more explicit than the Missouri statute at issue in Ashcroft, Pennsylvania's law provides, "It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he concluded in good faith, in his best medical judgment . . . that the abortion was necessary to preserve maternal life or health." 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983) (emphasis added). The court of appeals majority's decision to ignore the language of the statute conflicts with the decision in Ashcroft and

(1976), the Court unanimously upheld a requirement that physicians compile "relevant health and life data." Id., at 87. As Chief Judge Seitz noted in his partial dissent, the Missouri statute was general in its terms and it is impossible to determine, as the majority below seems to have done, whether Pennsylvania's requirements are more or less substantial than Missouri's. App. 147a. Chief Judge Seitz correctly concluded (a) that the requested information, on its face, clearly is relevant life and health data which physicians already obtain as a matter of course or which can be "easily obtained through simple questions or observation," App. 148a, and (b) that the magnitude of any increase in costs is speculative. App. 149a.

More recently, in Ashcroft, the

Court reaffirmed Danforth in upholding Missouri's requirement that a pathology report be filed after each abortion. Despite claims of increased cost, the Court found that the burden created by such a regulation is "relatively insignificant." Slip op. at 14. The Court observed that these reports "in concert with abortion complication reports, provide a statistical basis for studying those complications." Slip op. at 11. Proper application of these principles requires reversal of the court of appeals' declaration of unconstitutionality.

Section 3214(a) and (h) require reports to contain routine statistical information regarding abortions and complications from abortions. The sheer volume of statistics which this Court has reviewed in its decisions on this

subject, see City of Akron v. Akron Center for Reproductive Health, Inc., No. 81-746 (June 15, 1983), slip op., at 18-20; Ashcroft, slip op. at 6-9; Roe v. Wade, 410 U.S. 113, 149 (1973), underscores the need for this information. Under these circumstances, the appellees' utter failure to demonstrate any effect from the reporting requirements, including the inability to show any quantifiable, substantial increase in the price of an abortion, renders the ruling of the court of appeals in direct conflict with the prior decisions of this Court. The question is substantial and merits this Court's review.[12]

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[12]In the course of striking down the reporting requirements, the court of appeals also struck down Section 3211, which requires that reports be filed concerning the physician's determination whether a

FOOTNOTE continued to next page.

4. Section 3205(c)(2) of the Act requires the physician or his agent to inform the woman that medical assistance benefits may be available for prenatal and child care; that the father is liable to assist in the support of his child; and, that the woman has the option to review printed materials which describe the characteristics of the unborn child in objective, non-judgmental, scientifically accurate terms and which list agencies offering

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FOOTNOTE cont'd from previous page.

fetus is viable. The reasons which support the reporting requirements generally, together with the state's compelling interest in protecting a viable fetus, support this provision as well.

Moreover, in its shotgun attack on the statute, the majority brushed over the fact that it was also striking down the requirement of Section 3211 that physicians determine whether a fetus is viable - a requirement not challenged by appellees and clearly constitutional on its face.

assistance to women during pregnancy and after birth of the child.[13] The court of appeals struck down this provision despite this Court's conclusion in Akron that information of this type is "not objectionable." Slip op. at 27, n.37.

Section 3205(a)(1) requires that a woman be informed of the name of the physician who will perform the abortion; the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable; "medically accurate" information on the risks

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[13]Section 3205(a)(2) also requires that the specified information be provided to the woman 24 hours before the abortion is performed. The 24-hour requirement is not pressed here by appellants in light of the Court's ruling in Akron. Nevertheless, as with all challenged provisions of the Act, appellants wish to preserve their right to offer evidence in support of the 24-hour requirement at trial.

of the particular procedure to be employed; the probable gestational age of the unborn child; and, the medical risks associated with carrying the child to term.[14] Again, these provisions, designed as they are only to inform a woman of facts relevant to the abortion decision, are the types of information approved by this Court. See Akron, slip op. at 27, n.37; Planned Parenthood Assn. v. Fitzpatrick, 401 F.Supp. 554, 586-588 (E.D. Pa. 1975) (three judge court), aff'd mem. sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

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[14]Section 3205(a)(1) also contains 24-hour and physician-only counseling provisions found objectionable by the Court in Akron and by the court of appeals here. We press no challenges to those holdings at this time. It is clear that those provisions are severable from the remainder of Section 3205(a)(1) in view of the Act's broad severability clause. See Act No. 1982-138,§5, 1982 Pa. Legis. Serv. 750, 794 (Purdon), App. 279a.

As Judge Weis pointed out dissenting from the denial of rehearing in banc, the majority ignored the significant differences between Pennsylvania's statute and the ordinance struck down in Akron. App. 163a - 164a. Pennsylvania's statute does not contain the "parade of horribles" found objectionable in Akron, slip op., at 26. Indeed, it is scrupulous in its effort to assure that all information is non-judgmental and medically accurate. The majority below misapplied this Court's precedents in striking down Pennsylvania's informed consent provisions.

Similarly incongruous is the court of appeals' holding that Section 3208, which provides for the printing of materials describing the agencies available to help needy mothers and the characteristics of unborn children, is

unconstitutional. App. 58a. This provision was not challenged below and, as Chief Judge Seitz noted in his dissent, it is not inextricably intertwined with the informed consent provisions, nor is it itself unconstitutional. App. 136a - 141a. These errors present substantial questions justifying this Court's review.

5. Section 3206 of Pennsylvania's Act requires that unemancipated and immature minors obtain parental consent or judicial approval prior to obtaining an abortion. 18 Pa. Cons. Stat. Ann. §3206. The court of appeals correctly held that Pennsylvania's statute conforms to the standards for such legislation prescribed by this Court in Akron, slip op. at 20-23; Ashcroft, slip op., at 14-17 (Powell, J.); and, Bellotti v.

Baird, 443 U.S. 622, 640-642 (plurality opinion for four Justices), 656-657 (White, J., dissenting). Nevertheless, the court enjoined enforcement of Section 3206, apparently holding that the section is unconstitutional until the Pennsylvania Supreme Court issues detailed rules on the confidentiality and expedition of judicial approval proceedings. App. 56a.

In holding as it did, the court of appeals again ignored this Court's rulings. The court of appeals has failed, as this Court repeatedly has directed it, to give weight to the state courts' obligation to follow the statute's (and the Constitution's) directives that these proceedings be carried out confidentially and with dispatch. Ashcroft, slip op., at 14-15, n.16; Bellotti, 443 U.S., at 645, n.25. In fact, the court of appeals chose to

disregard the Court's holdings in Ashcroft and Bellotti that the absence of state court rules does not invalidate minor consent statutes which provide generally for expedited, confidential proceedings. Ibid.

Moreover, Pennsylvania's guidelines are not as amorphous as the court of appeals suggests. The statute itself requires a decision on a petition for court approval within three days and provides for "an expedited confidential appeal." 18 Pa. Cons. Stat. Ann. §3206(f), (h). As the court of appeals noted (App. 55a - 56a), the Pennsylvania's Chief Justice has instructed the local courts to apply the adoption rules, which contain provisions for confidentiality. See 23 Pa. Cons. Stat. Ann. §§2905-2906 (Purdon 1983). This action has been reinforced by the adoption of Rule of Judicial Administration 2157[8], which incorporates the confidentiality provisions of the Orphans' Court Rules[9] and establishes

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8 Rule of Judicial Administration 2157 provides, as follows:

Rule 2157. Proceedings Pursuant to Abortion Control [Act]

Jurisdiction in cases filed pursuant to Section 3206, Act No. 1982-138, known as the "Abortion Control Act," shall be in the Orphans' Court Division of the Court of Common Pleas, except in Philadelphia, where cases involving minors shall be heard in the Family Court Division. All proceedings under the Act shall be in conformity with Supreme Court Orphans' Court Rule 15.7.

9 Orphans' Court Rule 15.7 provides, as follows:

15.7. Impounding: docket entries; report; privacy.

(a) All proceedings shall be impounded, docket entries made, reports made to the Department of Public Welfare, and certificates of adoption issued as provided in Sections 505, 506, 507 and 508, respectively, of the Adoption Act.

FOOTNOTE cont'd on next page.

the appropriate jurisdiction for proceedings under the Act. These provisions, together with the state courts' statutory and constitutional duties, more than satisfy the requirements that this Court has imposed on judicial proceedings for minors' abortions.

The court of appeals' flagrant disregard of both the facts and the law relating to judicial proceedings for

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FOOTNOTE cont'd from previous page.

> (b) The name or names of the natural parents and the name or names of the child before adoption shall not be entered on any docket which is subject to public inspection.
>
> (c) No decision under the Adoption Act of any hearing judge or appellate court publicly reported or in any other way made available to the public by the court shall disclose the identity of the individual parties.

approval of minors' requests for abortions presents yet another substantial question meriting this Court's review.

6. The court of appeals held unconstitutional Section 3210(b) of the Act which requires a physician performing an abortion on a viable fetus to use the abortion method most likely to produce a live birth, unless that method "would produce a significantly greater medical risk to the life or health of the pregnant woman." The court properly noted that this type of provision is invalid only if it requires the pregnant woman to sacrifice her life or health for the viable fetus. App. 69a. See Colautti v. Franklin, 439 U.S. 379, 400 (1979); see also Ashcroft, slip op., at 8-9, n.8 (second physician requirement for abortion of viable fetus

permissible provided pregnant woman's life and health not endangered). But the court of appeals failed to follow the lead of the district court in construing the statute so as to preserve its constitution-

ality. Compare App. 70a, with App. 246a- 249a.

At issue is the term "significantly," and whether that term should be construed to mean, in the context of this statute, a "meaningful" increased risk (as appellants urged and the district court concluded) or a "substantial" increased risk (as appellees argued). This Court has stated time and again that federal courts are required to construe state statutes in such a manner as to dispel, not create, constitutional problems. Ashcroft, slip op. at 16; United States v. Harris, 347 U.S. 612, 618 (1954).

The district court observed, "Websters' Third New International Dictionary defines significant as 'having meaning,' 'having or likely to have influence or effect, 'and probably caused by something other than chance.'" App. 248a. Under this view of the critical term, the statute would not impose a sacrifice upon the pregnant woman's life or health.

The district court's construction of the statute, which certainly was a permissible one, properly respected this Court's direction to avoid constitutional problems. Yet, the court of appeals rejected the district court's constitutional construction of the statute in favor of an unconstitutional construction. In short, the court of appeals again consciously and directly violated this Court's directives. This question is substantial and calls for this Court's review.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Date: September 24, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,	:	
Appellants, Cross-Appellees	:	
	:	NO. 82-1785
V.	:	
	:	NO. 82-1846
RICHARD THORNBURGH, et al.,	:	
Appellees, Cross-Appellants	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Thornburgh, H. Arnold Muller, Helen O'Bannon, Michael J. Browne, William R. Davis, LeRoy S. Zimmerman and Joseph A. Smyth, Jr., appellees, cross-appellants in these cases, hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Third Circuit dated

May 31, 1984, rehearing denied by order dated June 28, 1984, reversing the judgment of the United States District Court for the Eastern District of Pennsylvania dated December 7, 1982.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

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Date: September , 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1785, 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all other similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellants in No. 82-1785
and Cross-Appellees
in Nos. 82-1846

VS.

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally, and in his official capacity, together with all others similarly situated,

Appellees in No. 82-1785
and Cross-Appellants
in No. 82-1846

ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 82-4336)

Originally Argued: March 11, 1983
Before: SEITZ, Chief Judge, HIGGINBOTHAM, and SLOVITER, Circuit Judges

Reargued Before Original Panel:
November 21, 1983

(Opinion filed May 21, 1984)

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OPINION OF THE COURT

SLOVITER, Circuit Judge.

The Supreme Court has firmly established that the fundamental constitutional protection of privacy encompasses a woman's right to obtain an abortion. At issue before us is the appellants' contention that Pennsylvania's 1982 Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983), impermissibly circumscribes that right. We examine that contention by considering the legislative background of the 1982 Act,

the procedural posture of this case, the applicable Supreme Court decisions, and a section-by-section analysis of the Pennsylvania Act. We conclude that most of the provisions attached by appellants are unconstitutional as a matter of law.

I.

LEGISLATIVE BACKGROUND OF THE 1982 ABORTION CONTROL ACT

Until Pennsylvania enacted its first comprehensive statute dealing with abortion, the relevant law provided that any person who took steps aimed at "unlawfully" causing a woman's miscarriage committed a felony punishable by fine and imprisonment. See Penal Code of 1939, No. 375, § 718, 1939 Pa. Laws 872, 958, saved from repeal, Crimes Code of 1972, No. 334, § 5, 1972 Pa. Laws 1482, 1611 (repealed 1974).[1] Because the statute did not define

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[1]A version identical except as to penalty was contained in the Penal Code of 1860, No. 374, § 88, 1860 Pa. Laws 382, 404-05. In 1850, the Pennsylvania Supreme Court held that the attempt to cause miscarriage was a crime at common law. See, e.g., Mills v. Commonwealth, 13 Pa. 631, 633 (1850)("It is a flagrant crime at common law to

(Footnote 1 continued next page).

"unlawfully" and did not specify whether therapeutic abortions were excepted, it was unclear whether a physician in Pennsylvania could legally terminate a pregnancy that involved substantial risk to the physical or mental health of the mother, although other jurisdictions permitted such abortions. See Trout, Therapeutic Abortion Laws Need Therapy, 37 Temp. L.Q. 172, 184-86 (1964); Note, The Antiquated Abortion Laws, 34 Temp. L.Q. 146, 150-51 (1961).

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attempt to procure the miscarriage or abortion of the woman . . . . It is a crime against nature which obstructs the fountain of life, and therefore is punished").

Other provisions of the Penal Code imposed a more severe penalty for abortions that caused a woman's death. Penal Code of 1939, § 719, and made it a crime for a woman to conceal the death of a bastard child. Id., § 720.

The landmark decision in Roe v. Wade, 410 U.S. 113 (1973), invalidated statutes such as Pennsylvania's because a general prohibition of abortions violated a woman's fundamental constitutional rights to privacy. See also Doe v. Bolton, 410 U.S. 179 (1973). The following year, Pennsylvania enacted the state's first comprehensive "Abortion Control Act" over the governor's veto. Abortion Control Act of 1974, No. 209, 1974 Pa. Laws 639 (amended 1978, repealed 1982). Many of the provisions of that Act, such as those requiring spousal or parental consent to an abortion, banning advertising of abortion procedures, and enacting a vague criminal standard governing abortions at

"viability," were held unconstitutional. See Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554 (E.D.Pa. 1975)(three-judge court), aff'd mem. in part sub nom. Franklin v. Fitzpatrick and vacated and remanded mem. in part sub nom. Beal v. Franklin, 428 U.S. 901 (1976), modified on remand, No. 74-2440 (E.D. Pa. Sept. 16, 1977) (unreported), aff'd sub nom. Colautti v. Franklin, 439 U.S. 379, 384-86 (1979) (explaining case history). See also Doe v. Zimmerman, 405 F. Supp. 534 (M.D. Pa. 1975)(three-judge court).

Thereafter, members of the Pennsylvania legislature made a renewed effort to enact a comprehensive scheme that contained stringent limitations on

abortions.[2] That bill was rejected by the relevant legislative committee; however, when presented on the floor of the House as an amendment to an unrelated Senate bill,[3] it passed overwhelmingly. Representative Stephen Friend, leader of floor debate and co-sponsor of the bill, reportedly explained its import at a news conference as follows:

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[2]The bill was based on a model developed by Americans United For Life, a Chicago-based nonprofit organization. See Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick. L. Rev. 373, 382 n.84 (1983); Ecenbarger, The Life and Death of Senate Bill 742, Philadelphia Inquirer, Jan. 31, 1982, Today Magazine at 16.

[3]The Senate bill to which the abortion amendment was attached and deemed "germane" by the House concerned "tough guy" competitions (bouts involving physical contact between individuals without professional experience.)

> Look, we can't stop abortions. The message we're sending to doctors is that: "We can't stop you from performing abortions. We wish we could, and we hope to God that someday we'll get the Human Life Amendment so we can. But until that time there are going to be regulations you'll have to follow it you're going to perform abortions."

Ecenbarger, The Life and Death of Senate Bill 742, Philadelphia Inquirer, Jan. 31, 1982, Today Magazine at 23.

The Senate, after scant debate, concurred in the House amendment, Pennsylvania's Governor, Dick Thornburgh, vetoed the bill stating.

> I am concerned that [some] provisions, and to some extent the entire tone and tenor of the bill, would have the effect of imposing an undue and, in some cases, unconstitutional burden upon even informed mature adults intent on obtaining an abortion under circumstances in which the U.S. Supreme Court has determined they are entitled to do so.

Veto Message to the Senate (Dec. 23, 1981), History of Senate Bills V-2, V-4

(1981-82).[4] The abortion control bill was then revised to some extent and, after being introduced on the floor of the House as an amendment to a bill regulating paramilitary training, passed both the House and Senate. It was signed by the Governor on June 11, 1982, to become effective December 8, 1982.

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[4]In his veto message, Governor Thornburgh also stated,

> What this bill would do is erect a series of hurdles which would have to be cleared by a pregnant woman interested in obtaining an abortion ....I am concerned that some of the detailed, complex and burdensome requirements of the bill, accompanied as they are by severe criminal penalties, could well foster an atmosphere in which many physicians would be deterred from providing the kind of abortion related medical services to which the U.S. Supreme Court has held their patients are constitutionally entitled. This could well disrupt the traditional doctor-patient relationship and impinge upon the right of physicians to refrain from

In brief, the 1982 Abortion Control Act imposes detailed regulation of abortions, requiring that a physician give specified information for informed consent; that a pregnant woman wait 24 hours to give her consent; that unemancipated minors obtain parental or judicial consent; and that all second trimester abortions be performed in hospitals. The Act also strictly limits abortions after a fetus may be "viable"; requires use of techniques and, in some instances, the presence of a second

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involvement in even medically necessary abortions, and to abandon the field to marginal practitioners. It could even lead to a resurgence of "back alley" abortions, which no thoughtful person would wish to happen.

Veto Message at V-4.

physician, to save the aborted fetus; imposes detailed reporting rules; requires pathology reports; restricts the use of public resources for abortions;[5] and regulates private insurance coverage. Physicians and clinics violating the Act's provisions are subject to criminal prosecution for felonies and misdemeanors, as well as to revocation or suspension of licenses and to civil tort liability.

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[5]The Commonwealth Court of Pennsylvania has recently held that restrictions on state funding of abortions, contained in 18 Pa. Cons. Stat. Ann. § 3215(c), violate the equal protection and privacy provisions of the state constitution as well as the federal constitutional right to privacy. Fischer v. Department of Public Welfare, No. 283 C.D. 1981 (Pa. Commw. March 9, 1984). See also Fischer v. Department of Public Welfare, 497 Pa. 267, 439 A.2d 1172 (1982)(affirming preliminary injunction against predecessor provision). This issue has not been raised before us.

II.

PROCEDURAL HISTORY

Before the Act took effect, plaintiffs, the American College of Obstetricians and Gynecologists, Pennsylvania Section (ACOG), individual physicians who perform abortions, abortion clinics, clergy, and one woman who has health insurance including comprehensive coverage for abortion, filed suit in the United States District Court for the Eastern District of Pennsylvania alleging that the Act was unconstitutional in its entirety. They filed a motion for preliminary injunction, accompanied by 41 affidavits from physicians, minors, counselors, experts, clinic directors and religious leaders and a comprehensive memorandum of law, Defendants, the governor and six other state and local officials

(referred to collectively as Pennsylvania), submitted an equally comprehensive opposing memorandum. The parties submitted the issues to the district court on a detailed stipulation of uncontested facts ("Stipulation") in lieu of testimony.

The district court issued an order on December 7, 1982 enjoining the mandatory 24-hour waiting period of section 3205. The court concluded, however, that plaintiffs had failed to establish a likelihood of success as to the remaining provisions and as to the Act in its entirety. American College of Obstetricians and Gynecologists v. Thornburgh, 552 F.Supp. 791 (E.D.Pa.

1982).[6] In its opinion, the district court relied in significant part on two decisions from other circuits which were then pending before

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[6]The district court concluded that plaintiff physicians, ACOG, and medical providers all had standing to raise their own interests (or the interests of members) and those of patients and customers in challenging the Act's constitutionality. We affirm this general conclusion. See, e.g., City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481 (1983)(challenge by abortion clinics and a physician); Planned Parenthood Association v. Ashcroft, 103 S.Ct. 2517 (1983)(challenge by Planned Parenthood, two physicians and an abortion clinic); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976)(challenge by Planned Parenthood and two physicians); Singleton v. Wulff, 428 U.S. 106, 112-18 (1976)(challenge by two physicians). We address infra at note 21 the specific question of standing with respect to the Act's insurance provisions. The clergymen were held by the district court to lack standing, 552 F.Supp. at 795, but do not appeal this conclusion. Defendant Thornburgh has been dismissed by stipulation of the parties. A motion by defendant O'Bannon for dismissal is pending.

the Supreme Court, Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), aff'd in part and rev'd in part, 103 S.Ct. 2481 (1983)(Akron), and Planned Parenthood Association v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), aff'd in part and rev'd in part, 103 S.Ct. 2517 (1983) (Ashcroft).

Plaintiffs immediately filed a notice of appeal, and the Commonwealth cross-appealed as to the 24-hour waiting period. On December 9, 1982, this court granted plaintiffs' request for a stay of enforcement of the Act pending appeal. After expedited briefing and oral argument, we ordered the matter held pending the Supreme Court's decision in Akron, Ashcroft, and a third case involving criminal sanctions for abortions, Simopoulos v. Virginia, 103

S.Ct. 2532 (1983). Following those decisions, we directed the parties to file supplemental briefs and heard reargument on the impact of those cases on the issues before us. Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law. Apple Computer, Inc. v. Franklin Corp., 714 F.2d 1240, 1242 (3d Cir. 1983).

III.

LEGAL PRINCIPLES GOVERNING ABORTIONS

The legal principles which guide our consideration of the Pennsylvania statute have evolved from the Supreme Court decisions in which the Court considered various state statutes or local ordinances regulating and/or prohibiting abortions.[7] The polestar remains

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[7]City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481 (1983); Planned Parenthood Association v. Ashcroft, 103 S.Ct. 2517 (1983); Simopoulos v. Virginia, 103 S.Ct. 2532 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 52 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975)(per curiam); Bigelow v. Virginia, 421 U.S. 809 (1975); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); United States v. Vuitch, 402 (Footnote continued on next page).

the seminal opinion of Justice Blackmun writing for the majority in Roe v. Wade, 410 U.S. 113 (1973). There the Court held that the fundamental constitutional right of privacy, which guarantees freedom of personal choice in matter of marriage and family life, see, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Grtswold v. Connecticut, 381 U.S. 479 (1965), also encompasses a woman's right to choose an abortion, 410 U.S. at 153. In the decade of decisions following Roe v. Wade, "the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the

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U.S. 62 (1971); see also Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980); cf. Carey, Population Services International, 431 U.S. 678 (1977) (restrictions on sale and advertising of contraceptives).

highly personal choice whether or not to terminate her pregnancy." City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2487 n.1 (1983)(Akron).

Because abortion is a medical procedure requiring the advice and assistance of competent, trained medical personnel, a woman cannot exercise her fundamental right alone. For this reason, the states must give the physician room to exercise sound medical judgment in assisting the woman to make and implement her decision. See Akron, 103 S.Ct. at 2491; Colautti v. Franklin, 439 U.S. 379, 387 (1979); Doe v. Bolton, 410 U.S. 179, 192 (1973); Even after the affirmation of these principles in Roe v. Wade and their reaffirmation in the cases that followed, some states have continued to enact laws limiting the

pregnant woman's constitutional right by placing burdensome restrictions on her physician, and by imposing other obstacles that prevent, delay, or discourage the woman's attempt to vindicate her right of personal choice. The role of the courts in reviewing such legislation has been clearly delineated: "(R)estrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest." Akron, 103 S.Ct. at 2491; Roe v. Wade, 410 U.S. at 155.

The Supreme Court has identified two compelling state interests that may justify regulation or control of the woman's exercise of her right: the health of the pregnant woman and the protection of the fetus capable of

meaningful life,[8] The Court has viewed the strength of the relevant interests in terms of the trimesters of pregnancy.

The state's interest in the mother's health becomes compelling at the end of the first trimester, Roe v. Wade, 410 U.S. at 163. Because of the relative simplicity and safety of abortion procedures during the first trimester, regulations imposed during that period and that restrict competent medical personnel do not appreciably advance the State's interest in maternal

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[8]The court has also recognized that states have a legitimate interest in protecting the best interests of minors who seek abortions and who may be less capable than adults of making important decisions. See Ashcroft, 103 S.Ct. at 2525 (parental or judicial consent); H.L. v. Matheson, 450 U.S. 398(1981)(parental notice).

health, Akron, 103 S.Ct. at 2492 & n.11, 2495 (explicitly retaining the trimester standard). The absence of a compelling state interest during the first trimester requires that the state permit the woman, "in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the state.'" Akron, 103 S.Ct. at 2492 (quoting Roe v. Wade, 410 U.S. at 163).[9]

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[9]However, certain regulations touching on first trimester abortions that have no significant impact on the woman's exercise of her right may be permissible if the State can prove they further important state health objectives without interfering in the physician-patient relationship or the woman's choice between abortion and childbirth. See Ashcroft, 103 S.Ct. at 2522-25 (pathology reports); Planned Parenthood v. Danforth, 428 U.S. at 65-67, 79-81 (minor informed-consent and recordkeeping requirements).

From the end of the first trimester, the state may regulate the abortion procedure to the extent that the regulation reasonably relates to the

preservation and protection of maternal health." Roe v. Wade, 410 U.S. at 163. These regulations may not depart from accepted medical practice. Akron, 103 S.Ct. at 2493. Moreover, the restrictions adopted as health standards must be legitimately and directly related to the health objective and must not be overbroad or unreasonably burdensome upon a woman's access to an abortion,[10] since during this

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[10]On these grounds, the Supreme Court has struck down a state ban on saline abortions in the second-trimester, finding that this would increase costs and limit availability of abortions without a showing of important health benefits. Planned Parenthood v. Danforth, 428 U.S. at 77-79. Similarly, the Court has rejected a requirement that second-trimester abortions be performed only in hospitals, concluding that the increased difficulty, cost, and risk of delay in finding and obtaining a hospital abortion was significant and that medical knowledge did not support hospitalization for all second-trimester abortions. Akron, 103 S.Ct. at 2495-97; Ashcroft, 103 S.Ct. at 2520.

period the state may not seek to "directly restrict[ ] a woman's decision whether or not to terminate her pregnancy." Colautti v. Franklin, 439 U.S. at 386.

The interest of the state in the potentiality of human life becomes compelling only at "viability," when the attending physician, "on the particular facts of the case before him," concludes there is a reasonable likelihood of the fetus' "sustained survival" and "meaningful life" outside the womb. Colautti v. Franklin, 439 U.S. at 387-88; see Roe v. Wade, 410 U.S. at 163. In Roe, the Court observed that most physicians placed viability at about seven months, though some considered it possible as early as six months, the end of the second trimester, 410 U.S. at 160.

States may regulate abortions after viability in the interest of the unborn child and may even prohibit abortions, except those to preserve the life or health of the mother. Id. at 164-65. "Serious ethical and constitutional difficulties" are presented, however, if such measures do not clearly prevent the doctor from "trad[ing] off" the health of the woman for that of the fetus. Colautti v. Franklin, 439 U.S. at 400. See also Ashcroft, 103 S.Ct. at 2522 n.8 (plurality); id. at 2530-31 (dissent). The Court has carefully examined statutes that impose duties or criminal sanctions on the physician at "viability" because of the significant dangers such laws pose as to vagueness, overbreadth, interference with the doctor-patient relationship, and chilling of the woman's constitutional

rights. See, e.g., Planned Parenthood v. Danforth, 428 U.S. at 82-84 (overbreadth); Colautti v. Franklin, 439 U.S. at 389-400 (vagueness, chilling, overbreadth).

With these principles in mind we turn to the Pennsylvania Act. We may not inquire as to whether the Pennsylvania legislature's intent to restrict a pregnant woman's fundamental right to choose an abortion was so "fundamental an inducement" as to invalidate the entire act, see 2 C. Sands, Sutherland Statutory Construction & 44.06 (4th ed. 1973), or whether the provisions that the Commonwealth now concedes are unconstitutional and those that we conclude impermissibly infringe on the woman's rights, see infra, are so central to the Act's dominant purpose as to warrant voiding the entire statute.

See 2 C. Sands at § 44.07. Instead of invalidating the entire act, as appellants urge, we are obliged to follow the example of the Supreme Court in overlooking what may reasonably be deemed to be a pervasive invalid intent, and instead review the various provisions of the Pennsylvania statute independently, and on their own merit. See, e.g., Ashcroft, 103 S.Ct. at 2521-26; Planned Parenthood v. Danforth, 428 U.S. at 63-67, 79-81 (both upholding portions of Missouri's comprehensive abortion legislation). The relevant provisions of the Pennsylvania 1982 Abortion Control Act are set forth in Appendix A to this opinion.

IV.

PROVISIONS CONCEDED TO BE UNCONSTITUTIONAL

The Commonwealth properly concedes that in light of Akron and Ashcroft, several sections of the Act are unconstitutional on their face. The only provisions enjoined by the district court are found in §§ 3205(a)(1) and (a)(2), and impose a 24-hour waiting period between the time a woman seeking an abortion receives the required medical advice and the time a physician may accept her certification of informed consent and perform the abortion. The Supreme Court in Akron found that no interest in maternal health was furthered by such an "arbitrary and inflexible waiting period" and that such a mandatory 24-hour waiting period impermissibly infringed upon the physician's discretion in the exercise

of medical judgment, while increasing the cost and risk in delay of abortions by requiring two trips to an abortion facility. 103 S.Ct. at 2503. "[I]f a woman, after appropriate counseling is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." Id.

Second, the Commonwealth concedes that the district court erred in upholding the requirement in section 3205(a)(1) that the physician performing the abortion or the referring physician, "but not. . .the agent or representative of either," counsel the woman on the risks of the abortion procedure. The Supreme Court found in Akron that it was "unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevent to informed consent," 103 S.Ct. at 2503,

because the State's interest is in ensuring that the woman "obtains the necessary information and counseling from a qualified person, not [in] the identity of the person from whom she obtains it. "Id. at 2502.

Third, the Commonwealth concedes the unconstitutionality of section 3209, which requires that all non-emergency abortions after the first trimester be performed in a hospital. The Supreme Court concluded that such a provision "places a significant obstacle in the path of women seeking an abortion." Akron, 103 S.Ct. at 2495. Not only do costs greatly increase, but given the difficulty of finding a willing hospital the requirement "may force women to travel to find available facilities, resulting in both financial expense and additional health risk." Id. This significant burden is not justifiable as

a health regulation because many second-trimester abortions can be performed safely on an outpatient basis. Thus, the requirement "has the effect of inhibiting . . . the vast majority of abortions after the fist 12 weeks and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion." Id. at 2497 (quoting Planned Parenthood v. Danforth, 428 U.S. at 79) (citations omitted). These rulings by the Supreme Court are dispositive of the similar provisions in the Pennsylvania Act.

V.

CHALLENGED PROVISIONS

§ 3203: Definitions

Abortion

The Act defines abortion as the use of any means to terminate a "clinically diagnosable" pregnancy "with

knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." It expressly excludes from the definition "the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of fertilized ovum within the uterus." Appellants challenge this definition as vague and overbroad. They argue that it may be read to include ordinary gynecological procedures on women not known or believed to be pregnant which cause an abortion when the woman's pregnancy was, in fact, diagnosable, and that this invalidity infects and is inseparable from the remainder of the Act. The Commonwealth concedes that the statute will survive only if "abortion" is defined to include an intent requirement. Brief for Appellees at 37-29.

If the Act explicitly defined abortion as the intentional termination of a human pregnancy, it would satisfy the requirement that a statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United States v. Harriss, 347 U.S. 612, 617 (1954), or give "a reasonable opportunity to know what is prohibited," Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). We have the duty in "marginal cases" to make the offense "constitutionally definite by a reasonable construction of the statute," United States v. Harriss, 347 U.S. at 618, and thus read the definition to incorporate an intent requirement as defined in the Pennsylvania Code, 18 Pa. Cons. State Ann. § 302(b)(1)(Purdon 1983), thereby saving it from unconstitutionality.

Physician

"Physician" is defined as "[a]ny person licensed to practice medicine in this Commonwealth." Appellants argue that the Act excludes osteopaths and that this exclusion violates the Equal Protection clause of the Fourteenth Amendment. The Commonwealth concedes that osteopaths are qualified to perform abortions. Brief for Appellees at 34; Stipulation para's. 56-57, App. at 84-85a. The Commonwealth contends that because osteopathic physicians are included in the general definition of "physician" as "an individual licensed under the laws of this Commonwealth to engage. . .in the practice of osteopathy or osteopathic surgery. . .," contained in the Statutory Construction Act, 1 Pa. Cons. Stat. Ann. § 1991 (Purdon Supp.

1982),[11] they are also within the class of "physicians" allowed to perform abortions under the Abortion Control Act.

The language of the abortion statute undercuts the Commonwealth's

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[11]Section 1991 incorporates the definition of "osteopathy" in the Act of March 19, 1909, No. 29, 1909 Pa. Laws 46, (codified as amended at 63 Pa. Cons. Stat. Ann. § 266 (Purdon 1968), which was repealed in 1978. The broad definition there provided that licensed osteopaths could practice "operative surgery, obstetrics, and the use of drugs without restriction. The phrase 'osteopathy and surgery' as used in this act means a complete school of the healing art applicable to all types and conditions of disease and disorders, and practiced as authorized herein by physicians and surgeons possessing the degree of doctor of osteopathy" (emphasis added). See Commonwealth v. Cohen, 142 Pa. Super. 199, 202-03, 15 A.2d 730, 732-33 (1940)(osteopaths have the standing of "physicians"). That Act was replaced by the Osteopathic Medical Practice Act, 63 Pa. Cons. Stat. Ann. §§ 271.1-18 (Purdon Supp. 1983), which although not specifically referred to in the Statutory Construction Act is consistent with the interpretation that all licensed osteopaths are "physicians." See 63 Pa. Cons. Stat. Ann. § 271.2.

position. It requires that the physician be "licensed to practice medicine," which, under Pennsylvania law, is distinguished, for some purposes, from being "licensed to practice osteopathic medicine," 63 Pa. Stat. Ann. § 421.7, even though the disciplines substantially overlap. The two branches are regulated by different acts, the Medical Practice Act, 63 Pa. Cons. Stat. Ann. § 421.1-18 (Purdon Supp. 1983), and the Osteopathic Medical Practice Act, 63 Pa. Cons. Stat Ann. §§271.1-18 (Purdon Supp. 1983), which establish separate regulatory bodies and qualifications.

Furthermore, the suggestion that the legislature intended to include osteopaths as "physicians" is inconsistent with the Act's disciplinary sanctions, which include license suspension and revocation under the

Medical Practice Act but not under the Osteopathic Medical Practice Act. See Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3204(d), 3205(c), 3206(i), 3209, 3211(b), 3213(c), 3214(i), 3219(a). The Medical Practice Act, by its express terms, does not apply to osteopathy. 63 Pa. Cons. Stat. Ann. § 421.17(a)(6).

In light of this statutory structure, and in the absence of a narrowing construction by Pennsylvania courts, we are unable to adopt the construction of the district court that "physician" in the Abortion Control Act includes osteopaths. However, our conclusion does not require striking down the entire Act. The better approach to this underinclusive statute is the one suggested by the Commonwealth as in accord with legislative intent: to strike and enjoin enforcement of the definition of "physician" contained in

section 3203, thereby returning the definition of physician to that generally applicable and contained in the Statutory Construction Act, which includes osteopaths. See Califano v. Westcott, 443 U.S. 76, 89 (1979); Snider v. Thornburgh, 496 Pa. 159, 178-79, 436 A.2d 593, 602 (1981).

§ 3205: Informed Consent

The provision that an abortion can be performed only with the voluntary and informed consent of the woman, which appellants do not challenge, also requires that specific information be imparted to her in order to secure her informed consent.[12] The district

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[12]The Commonwealth concedes that the additional requirement for physician-only counseling and the 24-hour waiting period are unconstitutional. See supra IV.

court rejected appellants' challenge to this requirement on the ground that it was not shown to cause undue burden or expense. 552 F.Supp. at 798-800.

Section 3205(a)(1) sets forth five categories of information that must be provided, including "[t]he fact that there may be detrimental physical and psychological effects which are not accurately foreseeable" ((a)(1)(ii)), and "[t]he probable gestational age of the unborn child at the time the abortion is to be performed" ((a)(1)(iii)). Section 3205(a)(2) sets forth three additional categories of information that must be provided, including "[t]he fact that medical assistance benefits may be available for prenatal care. childbirth and neonatal care" ((a)(2)(i)); "[t]he fact that the father is liable to assist in the support of her child, even in instances where the father

has offered to pay for the abortion" ((a)(2)(ii)); and the fact that the woman has the right to review certain printed materials described in section 3208, which include, e.g., "[g]eographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies;" a statement that "[t]he Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion"; and "[m]aterials designed to inform the woman of the probably anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including and relevant information on the possibility of the unborn child's

survival." See 18 Pa. Cons. Stat. Ann. § 3208 (incorporated by reference in § 3205(a)(2)(iii)).

No Supreme Court opinion has sustained a statutory provision prescribing in specific terms as here, the types of information that should be provided to a pregnant woman seeking an abortion. Instead, in Akron, where the Court reviewed an ordinance requiring the provision of specific information, much of which parallels that required here,[13] the Court struck the provision

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[13]For example, both the Akron ordinance and the Pennsylvania statute require, in addition to "the particular risks associated with [the procedure], that the woman be specifically informed of psychological and physical effects including hemorrhage, risks to subsequent pregnancies and sterility. See Akron, Ohio Codified Ordinances §§ 1870.05(b)(5),18 Pa. Cons. Stat. Ann. § 3205(a)(ii)-(iii). Both require information as to agencies that offer alternatives to

FOOTNOTE CONTINUED

in its entirety. The Court did so in reliance on two central precepts that have informed the abortion decision since Roe v. Wade and Doe v. Bolton; first, the principle of deference to the physician's medical judgment, which "may be exercised in light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient," and the concomitant need to allow "the attending physician the room he needs to

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FOOTNOTE CONTINUED

abortion. See Akron, Ohio Codified Ordinances § 1870.05(B)(7) (1978); 18 Pa. Cons. Stat. Ann §§ 3205(a)(2)(iii), 3208(a)(1). Both require information as to the fetus' probable gestational age and the availability of detailed information as to the characteristics of the fetus. Compare Akron, Ohio Codified Ordinances §§ 1870.05(b)(2)-(3) (physicians to inform of characteristics) with 18 Pa. Cons. Stat. Ann. §§ 3205(a)(1)(iv) and (a)(2)(iii)(physician to make available information as to characteristics spelled out in section 3208(a)(2)).

make his best medical judgment," Doe v. Bolton, 410 U.S. at 192, and second, the requirement that the state avoid regulations "designed to influence the woman's informed choice between abortion or childbirth." Akron, 103 S.Ct. at 2500.

As in Akron, "it is fair to say that much of the information required [availability of benefits, support liability, unforeseeable risks] is designed not to inform the woman's consent but rather to persuade her to withhold it altogether," an objection the Court found decisive in that case. 103 S.Ct. at 2500. Further, as in Akron, the specification of "a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision" impose objectionable obstacles to "the

responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." Id.

The Akron case reaffirms that the doctor/counselor must be given the opportunity to tailor the information given a patient to the exigencies of the case. Although some of the information listed in the Pennsylvania Act would be objectionable standing alone, see, e.g., 18 Pa. Cons. Stat. Ann. § 3205(a)(1)(i) (name of physician who will perform the abortion), and although the state may require in general terms that the woman be provided with information needed to secure her consent, Akron, 103 S.Ct. at 2501, the informed consent provisions of section 3205, just as those in Akron, are not severable. See id. at 2501 n.37. The entire scheme here and as incorporated in other sections defining

voluntariness in terms of specific information to be provided is invalid, and cannot be enforced.

§ 3206: Parental Consent

In this provision, the Act requires unemancipated minors to obtain the consent of their parents or a court order before an abortion can be performed. Appellants argue that this section deprives minors who choose abortion of equal protection of the law because it singles out abortion as the only pregnancy-related medical procedure requiring third party consent. Although this particular challenge was not before the Court in Akron or Ashcroft, and was specifically reserved by the Court in Bellotti v. Baird, 443 U.S. 622, 650 n.30 (1979)(Bellotti II), the Court has rejected challenges to abortion statutes based on different treatment in other

contexts between abortions and other medical decisions. See H. L. v. Matheson, 450 U.S. 398, 412-13 (1981)(distinction as to parental notice); Harris v. McRae, 448 U.S. 297, 325 (1980) (abortion funding); Planned Parenthood v. Danforth, 428 U.S. at 66-67 (written consent to abortion).

Moreover, states are permitted to regulate a minor's exercise of her constitutional rights in a manner that would not be permissible in the case of an adult in light of the special consideration that minors need. The Court has held that consent or notice provisions are important protections for minors who, because of stress of ignorance of alternatives, may not be able intelligently to decide whether to have an abortion. Id.; Bellotti II, 443 U.S. at 640-41 (plurality opinion by Powell, J.) see also Akron, 103 S.Ct at

2491 n.10. Therefore, we reject appellants' equal protection challenge.

Appellants also contend the section is void for vagueness because the term "emancipation" is not defined in the Act. The same defect was alleged in Ashcroft but was rejected by the Court on the ground that the term had a clear meaning in Missouri common law. 103 S.Ct. at 2525 n.18. Thus, the fact that in Pennsylvania, as in Missouri, "the question whether a minor is emancipated turns upon the facts and circumstances of each individual case" does not make it vague as a matter of law. Id.; see also Indiana Planned Parenthood Affiliates Association v. Pearson, 716 F.2d 1127, 1140 (7th Cir. 1983). We reject the vagueness challenge.

Appellants' challenge to the procedural inadequacies of this section causes us more concern. The state cannot impose a parental veto on the decision of a minor to undergo an abortion, Bellotti II, 443 U.S. at 649-50, and the state must provide an "alternative procedure whereby a pregnant mother may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." Akron, 103 S.Ct. at 2498. This alternative is particularly important because "there are few (other) situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Bellotti II, 443 U.S. at 642.

The Missouri statute upheld in Ashcroft establishing alternative court

proceedings for minor consent contained detailed provisions assuring confidentiality and dispatch, establishing a clear and simple procedure for the minor to follow in setting forth her petition, and directing court personnel to assist the minor in preparing the petition. Ashcroft, 103 S.Ct. at 2519-20 n.4, 2525-26. Comparable provisions are absent in the Pennsylvania statute. This difference is critical. To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form.

However, in light of the Pennsylvania Act's provision requiring the Supreme Court of Pennsylvania to promulgate rules assuring confidentiality and promptness of disposition, we cannot

hold that the provision is facially unconstitutional. We have been advised that the Pennsylvania Supreme Court has not yet enacted any rules to fill in the gaps of the Pennsylvania statute. In fact, it appears that the only county to establish rules on its own also included a provision for notification of the parents or alleged father, see Local R. No. 16.3(B), C.P. Chester County, 13 Pa. Admin. Bull. 2187, 2190 (1983), an obligation that may obstruct, rather than implement, the requirement that an alternative decision-maker be available. See Indiana Planned Parenthood Affiliates Association v. Pearson, 716 F.2d at 1132, 1139.

We cannot agree with the Commonwealth's suggestion that we regard a letter written by the then Chief Justice to the Common Pleas courts suggesting that the courts apply adoption rules "if

applicable", see Letter from Hon. Henry D. O'Brien, Chief Justice, to Hon. Anthony R. Appel, President Judge, C.P. Lancaster County (Nov. 16, 1982), included in Supplemental Brief for Appellees (Exhibit A) as a satisfactory substitute for written and explicit rules that fill the statutory gap. Consequently, although we do not invalidate section 3206, its operation should be enjoined until the state promulgates regulations, without prejudice to the right of these or other plaintiffs to attempt to demonstrate in this action, if still pending, or in some future action, that the regulations are unconstitutional.

§ 3207(b): Abortion Facilities, Reports

The challenged portion of this section requires abortion facilities to file reports that are subject to public disclosure containing information regarding abortion facilities and their affiliates. Appellants contend this forced disclosure is likely to subject them to threats, reprisals or harassment from segments of the public opposing abortion.

We agree with the district court that there is no evidence in the record that this section will appreciably affect a woman's abortion decision. Appellants have not as yet demonstrated a nexus between the disclosure of such information and the chilling of constitutional rights. Therefore we find inapposite Brown v. Socialist Workers '74 Campaign Committee, 103 S.Ct. 416 (1982), on which appellants

rely, where the Court held that compelled disclosure of party contributor lists may reasonably lead to harassment based on associational ties. Since there has been no showing of any effect of the disclosure on the abortion decision, and the state has proffered the important justification that the provision will help insure that shoddy practitioners may not hide behind the corporate veil, we reject appellants challenge.

§ 3208: Printed Information

This provision, discussed in connection with section 3205, fails for the reasons discussed there. We conclude it is inextricably intertwined with section 3205, and therefore cannot be severed. There is no certainty of any legislative intent that section 3208 should stand alone. We express no view

as to whether the state may undertake an independent informational campaign relating to abortion, since it has not done so here.

§ 3210: Abortion After Viability Prohibition

Section 3210(a) provides that "[a]ny person who intentionally, knowingly or reckless[ly] performs or induces an abortion when the fetus is viable" commits a felony of the third degree. A physician has two "complete defense[s]": that he had "concluded in good faith, in his best medical judgment," that (1) "the unborn child was not viable at the time the abortion was performed or induced," of that (2) "the abortion was necessary to preserve maternal life or health."

In Roe v. Wade, the Court decided that the "important and

legitimate interest [of the state] in protecting the potentiality of human life" becomes so compelling at viability that at this stage the state may proscribe abortions altogether, "except when it is necessary to preserve the life or health of the mother." 410 U.S. at 162, 164. Apparently because of this language, and its reiteration in the decisions that followed, appellants have not challenged the state's use of "viability" as the determining time when abortions are proscribed. Indeed, a statute that established the limit for performance of abortions in terms of the weeks of pregnancy would have been invalid. As the Court stated in Danforth, "[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation

period." 428 U.S. at 64.

On the other hand, because of the uncertainty of the viability determination itself, a statute that imposes strict criminal and civil liability upon a physician for performing or inducing an abortion after viability may create a profound chilling effect on the willingness of physicians to perform abortions near the point of viability. See Colautti v. Franklin, 439 U.S. at 396. Thus, we must be particularly cautious in scrutinizing these provisions to assure that they have not imposed or caused an impermissible restriction on acts that are constitutional. It is noteworthy that no Supreme Court case had upheld a criminal statute prohibiting abortion of a viable fetus. Each such statute considered either did not contain such a criminal provision effective at

viability or was invalidated because there were fatal omissions in the statutory language or scheme. See Danforth, 428 U.S. at 81-84 (plurality); id. at 89 (Stewart J., concurring) (upholding definition of viability, but striking down criminal sanction as overbroad); Colautti v. Franklin, 439 U.S. at 396 (striking down criminal sanction pertaining to viability as vague and potentially overbroad).[14] We therefore first consider whether this provision suffers from the same defects.

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[14]A Missouri statute containing such a sanction was at issue in Ashcroft. The Court did not address the general proscription of abortions after viability, see 103 S.Ct. at 2521, but upheld a provision requiring a second physician at viability and imposing penalties for violation. Id. at 2519 n.3, 2521-22.

The declaration of the prohibited act, i.e. abortion of a viable fetus, must be construed to incorporate the statutory definition of "viability" in section 3203. Appellants mount no independent challenge to that definition, and it parallels the definition of "viability" upheld in Danforth, 428 U.S. at 63.[15] Instead, appellants challenge the adequacy of the defenses, claiming that they are too narrow and are violative of due

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[15]The definition of "viability" contained in § 3203 and incorporated in § 3210(a) must be distinguished from the Act's definition in § 3203 of "born alive" as referring to a "human being [who] was completely expelled or extracted from his or her mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity." We express no view as to whether any sanctions may be imposed for conduct or omissions relating to a fetus that is "born alive."

process. Appellants claim that section 3210(a) is unconstitutional because it places the burden on the defendant physician to prove his or her innocence. They argue that the Pennsylvania Act does not squarely place the burden of proving absence of medical necessity on the state.

In United States v. Vuitch, 402 U.S. 62 (1971), the Court construed the District of Columbia's abortion ordinance, which also did not explicitly place upon the state the burden of proving the abortion was unnecessary. The Court, however, in construing the statute to uphold its constitutionality, reasoned that Congress could not have intended that a physician be required to prove his or her innocence, and held that the ordinance placed the burden on the prosecution to plead and prove the abortion was unnecessary. Id. at

70-71. Thereafter, in Simopoulos v. Virginia, 103 S Ct. at 2535, the Court held that it was permissible to place the burden on the defendant to invoke medical necessity as a defense, if the burden of proof of lack of medical necessity then shifted to the prosecution.

We recognize that the Pennsylvania Supreme Court, unlike the Virginia Supreme Court, has not yet issued an authoritative construction that the burden of proof as to lack of necessity rests with the prosecution. We are confident that the Supreme Court of Pennsylvania, if and when confronted with the issue, will also construe the statute in the manner adopted by the Supreme Court of the United States and the Supreme Court of Virginia. Because we believe the statute must be read as placing on the prosecution the burden or

proving absence of medical necessity, we reject appellants' challenge on this ground.

The second defense in § 3210(a) specifies that a physician may perform an abortion even after viability when necessary "to preserve maternal life or health." It is clear from the Supreme Court cases that "health" is to be broadly defined. As the Court stated in Doe v. Bolton, the factors relating to health include those that are "physical, emotional, psychological, familial, [as well as] the woman's age." 410 U.S. at 192.

As appellants have noted in their challenge to section 3210(b), it is apparent that the Pennsylvania legislature was hostile to this definition. Section 3210(b) contains the statement, "The potential psychological or emotional impact on the

mother of the unborn child's survival shall not be deemed a medical risk to the mother." Had the legislature imposed this qualification on the language "maternal. . .health" in section 3210(a), we would have no hesitation in declaring that provision unconstitutional. However, since it does not so state, and we are bound to construe it as constitutional, if possible, we again rely with confidence on the Supreme Court of Pennsylvania to construe "health" as does the Supreme Court of the United States.

We remain deeply concerned, however, because it is not improbably that imposition of criminal sanctions on physicians for the abortion of a viable fetus may deter conscientious physicians from undertaking the risk of error when the pregnancy approaches the end of the second trimester. However, the record

is silent on this issue. At this stage of the proceeding, and in light of the Supreme Court's reiteration of the state's power to prohibit abortion of a viable fetus unless medically necessary, we are compelled to reject any challenge to the facial validity of this provision. We express no view as to our holding were the appellants to produce convincing evidence of unconstitutional chill.

"Significantly greater" risk

Section 3210(b) requires that the method of abortion used when the fetus is viable must be that method most likely to result in the fetus being "aborted alive,"[16] unless that

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[16]The term "aborted alive" is not defined. We express no view as to its meaning or propriety.

procedure ould result in a "significantly greater" risk to the mother. In Colautti v. Franklin, 439 U.S. at 400, the Court held that the earlier Pennsylvania statute impermissibly required the doctor to "make a 'trade-off' between the woman's health and. . .fetal survival." The new Pennsylvania statute, like the old, fails to require that maternal health be the paramount consideration.

The district court recognized that if the Act required the mother to bear any increased risk in order to save the fetus, it would be unconstitutional, and attempted to save the provision by construing "significantly" to mean "medically cognizable." Under that construction, if the abortion technique that would save the fetus involves an increased risk to a mother, then the procedures safest for the mother must be

used.

Such a reading is inconsistent with the statutory language and the legislative intent reflected in that language. The legislature deliberately used the word "significantly" to modify the risk imposed on the mothers, and that adverb is patently not surplusage. In considering other sections of the statute, we have followed the principle of construing a statute, whenever possible, in such manner as to render it constitutional. However, that construction must be one to which the language of the statute is reasonably susceptible, and which comports with the probable intent of the legislature. See 2A C. Sands, Sutherland Statutory Construction § 45.11. Otherwise, this court would itself be acting as a legislature. We conclude that the language of section 3210(b) is not

susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus, and therefore hold section 3210(b) unconstitutional. In view of this ruling, we do not reach the other challenges raised by appellants to this section.

Second physician for viable fetus

Section 3210(c) requires, under penalty of prosecution for a felony, that a physician who performs an abortion using a method that "in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance. . .of a second physician" whose task is to take "all reasonable steps. . .to preserve the child's life and health." In Ashcroft, a majority of the Court upheld a provision of the

Missouri statute requiring a second physician to be present whenever an abortion is to be performed upon a viable fetus. Six Justices (the four dissenting Justices and Justice Powell, with whom the Chief Justice joined) expressed the view that an exception to the second physician requirement for medical emergencies was a factor essential to its validity. The four dissenting Justices believed this critical requirement could not be implied. 103 S.Ct at 2530-31. Justice Powell concluded that the existence of a clause in the same section requiring a physician to preserve the life of the fetus "provided that it does not pose an increased risk to the life and health of the woman" could reasonably be construed to supply a medical emergency exception to the second physician requirement. Id. at 2522 n.8.

The Pennsylvania Act, like the Missouri Act, has no clearly expressed exception for the performance of an abortion of a viable fetus without the second physician in attendance. We cannot with any confidence assume the legislature intended the clause in section 3210(a), providing a defense for abortions necessary to preserve maternal life or health, to be equally applicable to section 3210(c), the second physician requirement. The two provisions are separated by the intervening provision, section 3210(b) on degree of care, which on its face evinces the Pennsylvania legislature's unconstitutionally restrictive view of maternal health, a view not apparent in the parallel Missouri provision.

In light of this provision, the most reasonable construction we can make of the probable legislative intent is

its willingness to permit an abortion of a viable fetus with the defense of preservation of maternal life or health, but unwillingness to apply such a broad defense to the specific restrictions or regulations pertaining to the abortion of a viable fetus, i.e., those in section 3210(b) and section 3210(c).[17]

As with section 3210(b), we conclude we cannot rewrite the statute enacted by the legislature, and thus hold section 3210(c) similarly invalid for failing to prevent a trade-off

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[17]The Pennsylvania Act does contain an entirely separate definition of "medical emergency" not incorporated in § 3210(c). Such "emergencies" are limited to abortions necessary "to advert the death of the mother" or prevent "grave peril of immediate and irreversible loss of major bodily function." Were this definition read as applicable to the second physician requirement, even though the statute does not so provide, it would give the woman's own physician insufficient room to protect her health.

of maternal health for the possibility of fetal survival.[18]

§ 3211: Viability

This section, incorporated by reference in section 3214(a)(8), requires a physician to report the basis for his determination "that a child is not viable" and if he has determined that a child is viable, to "report the basis for his determination that the abortion is necessary to preserve maternal life or health."[19] Even

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[18]We do not reach the question whether § 3210(c) unconstitutionally requires the presence of a second physician at a stage prior to viability by the phrase "method [that] does not preclude the possibility of the child surviving the abortion."

[19]We believe Chief Judge Seitz too narrowly construes the scope of appellants' challenge to the reporting requirements. Two sections of the Act, §§ 3211 and 3214(a)(8), require the

FOOTNOTE CONTINUED

if we could read this section as requiring such reports only as to abortions performed subsequent to the first trimester of pregnancy, there is no important state interest further by requiring the physician to make such a report as to abortions of non-viable fetuses in the second trimester. The Commonwealth has adduced no evidence that there is a significant chance of viability throughout the second-trimester. The evaluation and reporting

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FOOTNOTE CONTINUED

filing of the same viability reports. Appellants have consistently challenged, in its entirety, the requirement of individual reports to be filed for each abortion under section 3214(a). Complaint para's. 121, 124, App. at 35a, 36a; Brief for Appellants at 43-44. Their briefs have also asserted a challenge in general terms to the undue burden of the Act's reporting requirements. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 98-107; Supplemental Brief for Appellants at 30-31.

requirements of section 3211(a) cannot be substantially distinguished from those of section 3214 discussed infra and fall for the same reasons.

§ 3214: Reporting

This section of the Act requires in (a), (b), and (h) detailed reporting with regard to each abortion performed irrespective of the state of pregnancy. The physician must sign a report to be filed the following month, which includes fourteen categories of data, including but not limited to identification of the physician, facility, and referring physician, agency or service; the political subdivision and state in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period and probable

gestational age of the unborn child; the type of procedure performed; complications; the "length and weight of the aborted unborn child when measurable"; the "[b]asis for any medical judgment that a medical emergency existed," the viability report referred to in section 3211(a), and the method of payment for the abortion. Another detailed report must be filed by the physician as to each woman who has "complications" from an abortion or attempted abortion.

In Danforth the Court upheld certain recordkeeping requirements imposed by that act on health facilities and physicians, stating, "Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." 428 U.S. at

80. However the Court characterized the Missouri Act's recordkeeping, later described in Akron as "minor regulations", 103 S.Ct. at 2493 & n.13, as "approaching impermissible limits". 428 U.S. at 81.

The statute challenged in Danforth merely provided generally for recordkeeping by health facilities and physicians concerned with abortions on forms to be supplied for the functions of "preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data" and monitoring abortions to assure that they are done in accordance with the provisions of the law. 428 U.S. at 87. That Act required no recordkeeping close to the extent imposed by the Pennsylvania Act. The Court cautioned that recordkeeping and record-

maintaining provisions must not be "utilized in such a way as to accomplish, through the sheer burden or recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." Id. at 81.

The nature and complexity of the reporting requirements of the Pennsylvania Act have crossed the permissible threshold. The district court here upheld the recordkeeping required in section 3214 as "related to the state's interest in protecting the health of its citizens." 552 F.Supp. at 804. The appropriate test is whether these detailed reporting requirements have a significant impact on the woman's abortion decision.

The parties have stipulated that the reporting requirements will increase the costs of the abortions. Stipulation para. 194. The state has proffered no

compelling state interest to justify much of the detail required. There are additional objections to some of the specific information required. For example, the compulsion that a physician report the basis for his or her medical judgment at various stages appears inconsistent with the Court's directive that a physician be accorded broad discretion, and could have a profound chilling effect on the willingness of physicians to perform abortions. See Colautti v. Franklin, 439 U.S. at 396. In light of our conclusion, we do not consider appellants' challenge that these provisions also invade the mother's and doctor's privacy.

Appellants have withdrawn their challenge to (c), and presumably also to its implementation in (d), based on the Ashcroft decision, which upheld a requirement that all tissue surgically

removed during an abortion be sent to a certified pathologist for examination. Supplemental Brief for Appellants at 17 n.5.[20] They have not separately challenged before us the requirement of quarterly statistical reports to be filed by each facility in which an abortion is performed (f), and the requirement of reports of maternal deaths (g). These provisions are severable from the remainder of section 3214. However, (e) requiring compilation and disclosure of the data gathered under (a) cannot be severed from (a) and therefore also falls.

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[20]In light of appellants' position, we do not consider the apparent difference between the purpose of the Pennsylvania provision, which appears to be directed to enforcement of the statute's viability provisions, and that in the Missouri Act, which was found to be directed to maternal health. Ashcroft, 103 S.Ct. at 2524-25.

§ 3215(e): Insurance

This provision requires health and disability insurers in Pennsylvania to make available policies that exclude coverage of elective abortions except in case of rape and incest. The statute also requires that these policies cost less than policies that offer comprehensive abortion coverage. The parties have stipulated that the actuarial cost of insurance without comprehensive abortion coverage may be higher or lower than insurance with comprehensive abortion coverage. Stipulation para's. 189-91.

Appellant Plant, who averred that she has health insurance including comprehensive coverage for abortion,

challenges this provision.[21] The district court concluded that this provision would not impose a legally significant burden on a woman's right to seek an abortion, and that it is "rationally related to the public policy of the Commonwealth encouraging childbirth over abortion." 552 F.Supp. at 809.

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[21]We reject appellees' challenge to Plant's standing and the district court's suggestion that she did not allege sufficient injury in fact. The Commonwealth has passed a provision aimed at influencing the conduct of insured to choose childbirth over abortion, and has stipulated that a foreseeable result is an increase in the cost of insurance to women, such as Plant, who purchase abortion coverage. This increased cost caused by a provision directed at her is sufficient injury in fact and places her within the zone of interests of the regulation. See Columbia Broadcasting System v. United States, 316 U.S. 407, 422 (1942); Colonial Penn Insurance Co. v. Heckler, 721 F.2d 431 (3d Cir. 1983); Cotovsky-Kaplan Physical Therapy Associates v. United States, 507 F.2d 1363 1367 (7th Cir. 1975).

The state generally need not commit public funds to abortion, and may in this respect choose childbirth over abortion as a matter of policy. See Harris v. McRae, 448 U.S. 297, 316-17 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977). However, this choice was only permissible in these cases "because it did not add any 'restriction on access to abortion that was not already there.'" Akron, 103 S.Ct. at 2500 n.33 (quoting Maher, 432 U.S. at 474). Pennsylvania has gone further in favoring childbirth over abortion, and has imposed a requirement on private insurers to issue policies which do cover them. This requirement adds an additional barrier to a woman's access to an abortion and is unconstitutional. The state has produced no adequate justification for the required lower cost, conceding that the real cost of

such policies may be higher. See Stipulation § 189-91. Thus, insurance costs for women who wish abortion coverage may rise. Because the right to an abortion if "fundamental," the state's assertion that the legislature may have concluded that costs may be lower for such policies is insufficient to withstand constitutional scrutiny.

VI.

SUMMARY

The foregoing lengthy analysis was dictated by the necessity of seriatim consideration of each of the challenged provisions of the statute. The Pennsylvania legislature chose to enact a complex and extensive regulatory scheme with severe criminal sanctions containing numerous provisions which it had been advised skirted constitutional limits. We have, when possible,

attempted to give effect to the legislative intent when the provision itself is permissible. Thus we have rejected appellants' general challenges that would have vitiated the entire Act. We have sustained the provision proscribing abortions after viability, and have sustained the provision requiring abortion facilities to file reports subject to public disclosure. Other reporting provisions that have not been challenged will also be operative. Similarly we have rejected the facial challenges to the minor consent provision, which can be effectuated as soon as the Pennsylvania Supreme Court fills the legislative gap with rules that rectify the procedural inadequacies.

At the same time we cannot overlook the legislature's unduly restrictive view of the right of a

pregnant woman aided by her physician to effectuate her fundamental constitutional right to an abortion. The exceedingly detailed reporting provisions, the requirement of discriminatory insurance, the compulsion that the physician or agent provide specified information to the pregnant woman, and the attempt to control the method of abortion and mandate the attendance of a second physician in a manner trading off the woman's health for that of the fetus, represent unacceptable legislative encroachments upon the woman's constitutional right and interfere with the physician-patient relationship.

We believe that the result reached here represents a delicate accommodation between permissible regulation and control of abortions on the one hand and vindication of the

woman's right on the other hand. We will remand this case to the district court for further proceedings in accordance with this opinion.

APPENDIX

RELEVANT SECTIONS OF THE
ABORTION CONTROL ACT

18 Pa. Cons. Stat. Ann. §§ 3201-3220

§ 3202. Legislative Intent

(a) Rights and Interests. -- It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion. It is the further intention of the General Assembly to foster the development of standards of professional conduct in a critical area of medical practice, to provide for development of statistical data and to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term. The General Assembly finds as fact that the rights and interests furthered by

this chapter are not secure in the context in which abortion is presently performed.

(b) Conclusions. -- Reliable and convincing evidence has compelled the General Assembly to conclude and the General Assembly does hereby solemnly declare and find that:

(1) Many women now seek or are encouraged to undergo abortions without full knowledge of the development of the unborn child or of alternatives to abortion.

(2) The gestational age at which viability of an unborn child occurs has been lowering substantially and steadily as advances in neonatal medical care continue to be made.

(3) A significant number of late-term abortions result in live births, or in delivery of children who could survive if measures were taken to

bring about breathing. Some physicians have been allowing these children to die or have been failing to induce breathing.

(4) Because the Commonwealth places a supreme value upon protecting human life, it is necessary that those physicians which it permits to practice medicine be held to precise standards of care in cases where their actions do or may result in the death of an unborn child.

(5) A reasonable waiting period, as contained in this chapter, is critical to the assurance that a woman elect to undergo an abortion procedure only after having the fullest opportunity to give her informed consent thereto.

(c) Construction. -- In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the

common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.

(d) Right of conscience. -- It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary

to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

§3203. Definitions

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Abortion." The use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the

uterus.

"Born alive." When used with regard to a human being, means that the human being was completely expelled or extracted from her or his mother and after such separation breathed or showed evidence of any of the following: beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity.

. . . .

"Facility" or "medical facility." Any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein medical care is provide to any person.

. . . .

"First trimester." The first 12 weeks of gestation.

"Hospital." An institution licensed pursuant to the provisions of the law of this Commonwealth.

. . . .

"Medical emergency." That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

"Medical personnel." Any nurse, nurse's aide, medical school student, professional or any other person who furnishes, or assists in the furnishing of, medical care.

"Physician." Any person licensed to practice medicine in this

Commonwealth

. . . .

"Probable gestational age of the unborn child." What, in the judgment of the attending physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed.

"Unborn child." For purposes of this chapter, a human being from fertilization until birth and includes a fetus.

"Viability." That stage of fetal development when, in the judgment of the physician based on the particular facts of the case before him and in light of the most advanced medical technology and information available to him, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

§3205. Informed consent

(a) General rule. -- No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) The woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion or by the referring physician but not by the agent or representative of either.

(i) The name of the physician who will perform the abortion.

(ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable.

(iii) The particular medical risks associated with the particular

abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility.

(iv) The probable gestational age of the unborn child at the time the abortion is to be performed.

(v) The medical risks associated with carrying her child to term.

(2) The woman is informed, by the physician or his agent, at least 24 hours before the abortion;

(i) The fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(ii) The fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

(iii) That she has the right to review the printed materials described in section 3208 (relating to printed information). The physician or his agent shall orally inform the woman that the materials describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. If the woman is unable to read the materials furnished her, the materials shall be read to her. If the woman seeks answers to questions concerning any of the information or materials, answers shall be provided her in her own language.

(3) The woman certifies in writing, prior to the abortion, that the information described in paragraphs (1) and (2) has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (2).

(4) Prior to the performance of the abortion, the physician who is to perform or induce the abortion or his agent receives a copy of the written certification prescribed by paragraph (3).

(b) Emergency. -- Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, if the medical indications supporting his judgment that an abortion is necessary to avert her death.

(c) Penalty. -- Any physician who violates the provisions of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of

1974." Any other person obligated under this chapter to give information relating to informed consent to a woman before an abortion is performed, and who fails to give such information, shall, for the first offense be guilty of a summary offense and, for each subsequent offense, be guilty of a misdemeanor of the third degree.

(d) Limitation on civil liability. -- Any physician who compiles with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P.L. 390, No. 111), known as the "Health Care Services Malpractice Act."

§3206. Parental consent

(a) General rule. -- Except in the case of a medical emergency

except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa. C.S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In obtaining the consent of the woman's parent or guardian, the physician shall provide them the information and materials specified in section 3205

(relating to informed consent), and shall further obtain from them the certification required by section 3205(a)(3). In the case of a pregnancy that is the result of incest where the father is a party to the incestuous act, the pregnant woman need only obtain the consent of her mother.

(b) Unavailability of parent or guardian. -If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

(c) Petition to court for consent. -- If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

(d) Court order. -- If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and

capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

(e) Representation in proceedings. -- The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel and shall, upon her request, provide her with such counsel.

(f) Proceedings confidential. -- Court proceedings under this section shall be confidential and shall be given such precedence over other pending

matters as will ensure that the court may reach a decision promptly and without delay in order to serve the best interests of the pregnant woman, but in no case shall the court fail to rule within three business days of the date of application. A court of common pleas which conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting its decision and shall order a sealed record of the evidence to be maintained which shall include its own findings and conclusions.

(g) Coercion prohibited. -- Except in a medical emergency, no parent, guardian or other person standing in loco parentis shall coerce a minor or incompetent woman to undergo an abortion. The court shall grant such relief as may be necessary to prevent such coercion. Should a minor be denied

the financial support of her parents by reason of her refusal to undergo abortion, she shall be considered emancipated for purposes of eligibility for assistance benefits.

(h) Regulation of proceedings. -- No filing fees shall be required of any woman availing herself of the procedures provided by this section. An expedited confidential appeal shall be available to any pregnant woman whom the court denies an order authorizing an abortion. The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition.

(i) Penalty. -- Any person who performs an abortion upon a woman

who is an unemancipated minor or incompetent to whom this section applies either with knowledge that she is a minor or incompetent to whom this section applies, or with reckless disregard or negligence as to whether she is a minor or incompetent to whom this section applies, and who intentionally, knowingly or recklessly fails to conform to any requirement of this section is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be suspended in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974," for a period of at least three months. Failure to comply with the requirements of this section is prima facie evidence of failure to obtain informed consent and of interference with family

relations in appropriate civil actions. The law of this Commonwealth shall not be construed to preclude the award of exemplary damages or damages for emotional distress even if unaccompanied by physical complications in any appropriate civil action relevant to violations of this section. Nothing in this section shall be construed to limit the common law rights of parents.

§3207. Abortion facilities

. . . .

(b) Reports. -- Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, which shall be open to public inspection and copying, containing the following information:

(1) Name and address of the facility.

(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership with any other facility.

Any facility failing to comply with the provisions of the subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof.

§3208. Printed information

(a) General Rule. -- The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, the following easily

comprehensible printed materials:

(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall include the following statement:

"There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."

(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival. The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

. . . .

§3209. Abortion after first trimester

All abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital. Except in cases of good faith judgment that a medical emergency exists, any physician who performs such an abortion in a place other than a hospital is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

§3210. Abortion after viability

(a) Prohibition; penalty. -- Any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree.

It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

(b) Degree of care. -- Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the

unborn child to be aborted alive unless, in the food faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Any person who intentionally, knowingly or recklessly violates the provisions of this subsection commits a felony of the third degree.

(c) Second physician. -- Any person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange

for the attendance, to the same room in which the abortion is to be completed, of a second physician. Immediately after the complete explusion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health. Any person who intentionally, knowingly, or recklessly violates the provisions of this subsection commits a felony of the third degree.

§3211. Viability

(a) Determination of viability. -- Prior to performing any abortion upon a woman subsequent to her first trimester of pregnancy, the physician shall determine whether, in his good faith judgment, the child is

viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

(b) Unprofessional conduct. -- Failure of any physician to conform to any requirement of this section constitutes "unprofessional conduct" within the meaning of the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974." Upon a finding by the State Board of Medical Education and Licensure that any physician has failed to conform to any requirement of this section, the board shall not fail to suspend that physician's license for a period of at least three months. Intentional,

knowing or reckless falsification of any report required under this section is a misdemeanor of the third degree.

§3214. Reporting

(a) General rule. -- A report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

(1) Identification of the physician who performed the abortion and the facility where the abortion was performed and of the referring physician, agency or service, if any.

(2) The political subdivision and state in which the woman resides.

(3) The woman's age, race and marital status.

(4) The number of prior pregnancies.

(5) The date of the woman's last menstrual period and the probable gestational age of the unborn child.

(6) The type of procedure performed or prescribed and the date of the abortion.

(7) Complications, if any, including but not limited to rubella disease, hydatid mole, endocervical polyp and malignancies.

(8) The information required to be reported under section 3211(a) (relating to viability).

(9) The length and weight of the aborted unborn child when measurable.

(10) Basis for any medical judgment that a medical emergency existed as required by any part of this chapter.

(11) The date of the medical consultation required by section 3204(b) (relating to medical consultation and judgment).

(12) The date on which any determination of pregnancy was made.

(13) The information required to be reported under section 3210(b) (relating to abortion after viability).

(14) Whether the abortion was paid for by the patient, by medical assistance, or by medical insurance coverage.

(b) Completion of report. -- The reports shall be completed by the hospital or other licensed facility, signed by the physician who performed the abortion and transmitted to the department within 15 days after each reporting month.

(c) Pathological examinations. -- When there is an abortion performed during the first trimester of pregnancy, the tissue that is removed shall be subjected to a gross microscopic examination, as needed, by the physician

or a qualified person designated by the physician to determine if a pregnancy existed and was terminated. If the examination indicates no fetal remains, that information shall immediately be made known to the physician and sent to the department within 15 days of the analysis. When there is an abortion performed after the first trimester of pregnancy where the physician has certified the unborn child is not viable, the dead unborn child and all tissue removed at the time of the abortion shall be submitted for tissue analysis to a board eligible or certified pathologist. If the report reveals evidence of viability or live birth, the pathologist shall report such findings to the department within 15 days and a copy of the report shall also be sent to the physician performing the abortion. Intentional knowing, reckless

or negligent failure of the physician to submit such an unborn child or such tissue remains to such a pathologist for such a purpose, or intentional knowing or reckless failure of the pathologist to report any evidence of live birth or viability to the department in the manner and within the time prescribed is a misdemeanor of the third degree.

(d) Form. -- The department shall prescribe a form on which pathologists may report any evidence of absence of pregnancy, live birth or viability.

(e) Statistical reports; public availability of reports. --

(1) The department shall prepare an annual statistical report for the General Assembly based upon the data gathered under subsection (a). Such report shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed,

and shall be available for public inspection and copying.

(2) Reports filed pursuant to subsection (a) shall not be deemed public records within the meaning of that term as defined by the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law, but shall be made available for public inspection and copying within 15 days of receipt in a form which will not lead to the disclosure of the identity of any person filing a report. On those reports available for public inspection and copying, the department shall substitute for the name of any physician which appears on the report, a unique identifying number. The identity of the physician shall constitute a confidential record of the department. The department may set a reasonable per copy fee to cover the cost of making any copies authorized hereunder.

(3) Original copies of all reports filed under subsection (a) shall be available to the State Board of Medical Education and Licensure and to law enforcement officials, for use in the performance of their official duties.

(4) Any person who willfully discloses any information obtained from reports filed pursuant to subsection (a), other than that disclosure authorized under paragraph (1), (2) or (3) hereof or as otherwise authorized by law, shall commit a misdemeanor of the third degree.

(f) Report by facility. -- Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report

shall also show the total abortions performed in each trimester of pregnancy. These reports shall be available for public inspection and copying.

(g) Report of maternal death. -- After 30 days' public notice, the department shall henceforth require that all reports of maternal deaths occurring within the Commonwealth arising from pregnancy, childbirth or intentional abortion in every case state the cause of death, the duration of the woman's pregnancy when her death occurred and whether or not the woman was under the care of a physician during her pregnancy prior to her death and shall issue such regulations as are necessary to assure that such information is reported, conducting its own investigation if necessary in order to ascertain such data. A woman shall be deemed to have

been under the care of a physician prior to her death for the purpose of this chapter when she had either been examined or treated by a physician, not including any examination or treatment in connection with emergency care for complications of her pregnancy or complications of her abortion, preceding the woman's death at any time which is both 21 or more days after the time she became pregnant and within 60 days prior to her death. Known incidents of maternal mortality of nonresident women arising from induced abortion performed in this Commonwealth shall be included as incidents of maternal mortality arising from induced abortions. Incidents of maternal mortality arising from continued pregnancy or childbirth and occurring after induced abortion has been attempted but not completed, including deaths occurring after induced

abortion has been attempted but not completed as a result of ectopic pregnancy, shall be included as incidents of maternal mortality arising from induced abortion. The department shall annually compile a statistical report for the General Assembly based upon the data gathered under this subsection, and all such statistical reports shall be available for public inspection and copying.

(h) Report of complications. -- Every physician who is called upon to provide medical care or treatment to a woman who is in need of medical care because of a complication or complications resulting, in the good faith judgment of the physician, from having undergone an abortion or attempted abortion shall prepare a report thereof and file the report with the department within 30 days of the

date of his first examination of the woman, which report shall be open to public inspection and copying and shall be on forms prescribed by the department, which forms shall contain the following information, as received, and such other information except the name of the patient as the department may from time to time require:

(1) Age of patient.

(2) Number of pregnancies patient may have had prior to the abortion.

(3) Number and type of abortions patient may have had prior to this abortion.

(4) Name and address of the facility where the abortion was performed.

(5) Gestational age of the unborn child at the time of the abortion, if known.

(6) Type of abortion performed, if known.

(7) Nature of complication or complications.

(8) Medical treatment given.

(9) The nature and extent, if known, of any permanent condition caused by the complication.

(i) Penalties. --

(1) Any person required under this section to file a report, keep any records or supply any information, who willfully fails to file such report, keep such records or supply such information at the time or times required by law or regulation is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

(2) Any person who willfully delivers or discloses to the department any report, record or information known by him to be false commits a misdemeanor of the first degree.

(3) In addition to the above penalities, any person, organization or facility who willfully violates any of the provisions of this section requiring reporting shall upon conviction thereof:

(i) For the first time, have its license suspended for a period of six months.

(ii) For the second time, have its license suspended for a period of one year.

(iii) For the third time, have its license revoked.

§3215. Publicly owned facilities; public officials and public funds.

. . . .

(e) Insurance policies. -- All insurers who make available health care and disability insurance policies in this Commonwealth shall make available such policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest. Any such policy shall contain a premium which is lower than that which is contained in policies offering additional abortion coverage.

. . . .

SEITZ, Chief Judge, dissenting in part.

I concur in most of the majority's opinion, but I write separately for two reasons. The first is because in several instances the majority has struck down provisions of the Abortion Control Act that I believe are constitutional. Second, I am

especially concerned about the two instances, involving subsection (2) of section 3210 and section 3211, where the majority has addressed issues which I believe are not raised by the plaintiffs on appeal. It is my view that when deciding the constitutionality of a state statute it is particularly important that a federal court refrain from reaching out for issues not before it. In order to make any positions clear, I will address separately each section of the act addressed by the majority, using the same headings as in the majority opinion.

Section 3203: Definitions

Abortion. I join the majority in construing the definition of "abortion" as incorporating the intent requirement of 18 Pa. Cons. Ann. §302(b)(c).

Physician. I join the majority in striking the definition of "physician" in the Abortion Control Act and applying the definition in the Statutory Construction Act, 1 Pa. Cons. Stat. Ann. § 1991.

Section 3205: Informed Consent

The Supreme Court's decisions in the Akron and Ashcroft cases make it clear that the 24-hour waiting period and the physician-only counseling requirements are unconstitutional. Pennsylvania conceded the unconstitutionality of these provisions. I therefore join the majority opinion to the extent that it strikes down these portions of section 3205.

The majority goes further, however, and strikes down subsection (a)(2) of section 3205 as well. I believe that this subsection is

constitutional. A similar requirement at issue in Akron was struck down only because the information had to be provided by a physician. The information itself, however, was "not objectionable." Akron, 103 S. Ct. at 2501 n.37. In Pennsylvania the information may be given by a non-physician counselor, so the objection the Supreme Court had to the Akron statute does not apply here. The majority's reliance on footnote 37 of the Akron opinion to support its refusal to sever and sustain subsection (a)(2) is misplaced. The same is true of the language from the Akron opinion quoted by the majority suggesting that subsection (a)(2) is an attempt to sway the woman against having an abortion or compels the physician to give information irrelevant to her personal circumstances. None of the language

quoted in the majority opinion is addressed to those provisions of the Akron statute resembling subsection (a)(2).

In short, I believe that the Akron decision does not compel the conclusion that subsection (a)(2) is unconstitutional. I therefore dissent from that part of the majority opinion striking down this subsection. Section 3206: Parental Consent

I concur in the majority's disposition of the attacks on this section.

Section 3207(b): Abortion Facilities, Reports

I join that part of the majority opinion rejecting plaintiffs' attack on section 3207.

Section 3208: Printed Information

The majority strikes down this section because it is "inextricably

intertwined" with section 3205, which the majority strikes down in its entirety. The sole link between sections 3208 and 3205 is a cross reference in subsection (a)(2) of section 3205. It appears to me that section 3208 could stand on its own, and so I do not believe that a mere cross reference in section 3205 so taints section 3208 that it must fall at well. The majority does not discuss severance other than to say that there "is no certainty of any legislative intent that section 3208 should stand alone." This approach classes with the severability clause included in the Act, which provides that "if any provision of this act . . . is held invalid . . . the remainder of this act or chapter . . . shall not be affected thereby."

I also dissent from this part of the majority opinion because I believe

that subsection (a)(2) of section 3205 is constitutional. Since the reference to section 3208 is in a part of section 3205 that I would sustain, in my view section 3208 is not "inextricably intertwined" with an unconstitutional provision.

Finally, I believe that section 3208, standing alone, is constitutional. The only provision which could be open to any dispute is subsection (b), which requires that the printed information describe "the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments." Statutes of other jurisdictions requiring physicians to read descriptions of the unborn child to the mother prior to her consenting to an abortion have been struck down on the grounds that they interfere with the physician's exercise of his best medical

judgment, that they require presentations in such lurid detail that they cause the woman mental anguish, that they represent impermissible attempts to sway the woman against abortion, or that they require the physician to state accurately that which cannot be known with certainty. See, e.g., Akron, 103 S. Ct. at 2500-01; Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1021 (1st Cir. 1981); Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980); Leigh v. Olson, 497 F.Supp. 1340, 1346 (D. N.D. 1980); Margaret S. v. Edwards, 488 F. Supp. 181, 208-09 (E.D. La. 1980).

The Pennsylvania statute avoids these problems because it simply provides the woman the right to view the printed materials if she so desires.

There is no requirement that she view the materials or that the physician state the precise characteristics of the unborn child. There is no requirement that the materials go into detail likely to shock the mother. The statute specifically limits the printed materials to "scientifically accurate" information, which presumably would exclude such offensive detail as the unborn child's sensitivity to pain. Akron, 103 S.Ct. at 2500 n.34. Finally, nothing in the statute prevents the physician from advising that the woman not view the materials, or disputing or supplementing them with his own information. I conclude that subsection (b) of section 3208 does not share the infirmities of the statutes struck down in the cases cited in the previous paragraph, and therefore I would sustain it.

Section 3209: Hospital-Only Requirement

The Supreme Court in Akron struck down as "a significant obstacle in the path of a woman seeking an abortion" a requirement that all abortions after the first trimester be performed in a hospital, 103 S. Ct. at 2495. Pennsylvania has conceded the unconstitutionality of section 3209, which imposes a similar requirement. I join the majority in striking down this section.

Section 3210: Abortion After Viability

Prohibition. I join that part of the majority opinion holding that the Supreme Court's decision in the Simopoulos case compels us to construe section (a) of section 3210 as placing the burden of proving lack of medical necessity on the prosecution.

I do not join that part of the majority opinion rejecting the challenge

to the definition of "maternal health." My reading of the briefs does not disclose that plaintiffs have raised this issue on appeal.

Finally, I dissent from that part of the majority opinion discussing the chilling effect of the statute. The purpose of a criminal statute is to chill certain conduct. I believe that the only chilling which can concern us is that caused by some unconstitutional feature of the statute, such as vagueness of overbreadth. By incorporating an intent requirement into the definition of "abortion" found in section 3210 to place the burden of disproving medical necessity on the prosecution, we have addressed the specific sources of chilling identified by the plaintiffs.

The Supreme Court has made it clear that there is a permissible scope

of state regulation of abortion. We can give no remedy when the physician, through his own overreacting, is chilled by regulations within this permissible scope. To the extent that the majority is suggesting that the mere existence of the Abortion Control Act, although constitutional, chills physicians, I believe that the problem is one which we may not remedy. To the extent that the majority is suggesting that other constitutional problems not addressed here may, if proved in later litigation, lead to a finding of impermissible chilling, I believe that we should await that future case. In either event I cannot join that part of the majority opinion addressing this issue.

"Significantly greater" risk. I join that part of the majority opinion holding subsection (b) of section 3210 unconstitutional.

Second physician for viable fetus. The majority strikes down subsection (c) on the ground that it contains no exception to the second-physician requirement in the case of a medical emergency. I dissent from this part of the majority opinion. I agree with the majority that the Ashcroft decision requires that in order to be constitutional, a second-physician requirement must include an exception for emergencies. I believe, however, that such an exception is clearly expressed in subsection (a), which provides that "[it] shall be a complete defense to any charge brought against a physician for violating the requirements of this section . . . that the abortion was necessary to preserve maternal life or health." (emphasis added). The plain meaning of the word "section" is to refer to section 3210 as a whole,

including subsections (a), (b) and (c). This conclusion is bolstered by the legislature's use of the term "subsection" in subsections (b) and (c) when referring to matters limited to each of those subsections.

Had the legislature meant to limit the applicability of the medical emergency defense to subsection (a), it stands to reason that the legislature would have referred to "this subsection" rather than "this section." The majority ignores the use of the different terms and holds that to apply the medical emergency exception in subsection (a) to the second-physician requirement of subsection (c) would "rewrite the statute." However, since it is evident to me that the legislature was aware of the distinction between section and subsection, I believe that we should give effect to the plain

wording of the medical emergency exception. I would hold that it applies to the second-physician requirement in subsection (c), and therefore I would sustain subsection (c).

Section 3211: Viability

I dissent from that part of the majority opinion striking down section 3211 because I do not believe that a challenge to this section is before us. Section 3211 is not mentioned by the plaintiffs in the complaint in the district court, and I cannot find a challenge to it in the briefs filed in this court.

Section 3214: Reporting

The majority strikes down subsections (a), (b), and (h) of section 3214. I dissent from this part of the majority opinion because I do not regard these reports as having a legally significant impact on the abortion

decision. The majority first compares the requirements of section 3214 to those permitted by the Supreme Court in the Danforth case and finds Pennsylvania's requirements much more onerous. The Missouri statute sustained in Danforth provided for "the compilation of relevant maternal health and life data" without specifying what this means. 428 U.S. at 87. Based on this broad description in the Missouri statute I am unable to determine, as the majority apparently has, that the Missouri reporting requirements are more or less onerous than Pennsylvania's. In any event, in my view most of what Pennsylvania asks for in subsections (a) and (h) is "relevant maternal health and life data." I also believe that it meets the Danforth standard that the reports be "reasonably directed to the preservation of maternal health." 428 U.S. at 80.

The majority next suggests that the Pennsylvania requirement is so burdensome as to constitute an unconstitutional restriction on access to abortion. I disagree. In my view, to constitute an unconstitutional restriction a reporting statute would have to compel the physician to go out of his way to collect data that he would not otherwise need to make an informed medical judgment. However, subsections (a) and (h) require the physician to report information which I believe most physicians would obtain as a matter of course, or which is easily obtained through simply questions or observation. I am not persuaded that requiring the physician to report information of this sort imposes a legally significant burden.

The majority then states that the reporting requirements are

unconstitutional because they will increase the costs of an abortion. The majority relies on paragraph 194 of the stipulation of facts, which states that the reporting requirements of section 3214 will cause the price of an abortion to increase by an unspecified amount. To me, this is an insufficient basis on which to conclude that a legally significant burden is imposed. The stipulation refers to section 3214 as a whole, not to the three subsections which are struck down. We have no way of knowing what cost increase is attributable to these three subsections.[22]

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[22]In fact, it is not reasonable to infer that much of the cost increase complained of in the stipulation would be caused by the pathologist's exam required by subsection (c) of section 3214. Plaintiffs have conceded that this requirement is constitutional.

It is significant that we do not know what cost increase would be caused by the subsections under attack, because not every cost increase caused by regulation imposes a legally significant burden on abortion. For example, five Justices concluded in the Ashcroft case that a required pathologist's examination that would add $19 to the cost of an abortion did not impose a legally significant burden. There is no evidence that we are dealing with a cost increase even approaching that magnitude. The majority has relieved the plaintiffs of their burden of proof by presuming that we are dealing with a cost increase significant enough to be unconstitutional. In my view doing this does not accord with the presumption of constitutionality favoring section 3214.

My belief, based on this record, that these subsections of section 3214

are not unconstitutional for the reasons stated by the majority compels me to reach the other ground advanced by the plaintiffs, that the reporting requirements violate the physician's and patient's privacy. I reject this contention. Subsections (e)(1) and (2) ensure that the identity of both the physician and the patient will not be available to the public. In addition, the pertinent statutory provisions prohibit including the name of the patient in the reports required by subsections (a) and (h). Finally, because I believe that the reporting requirement in subsection (a) is constitutional, I believe that subsection (b) requiring the transmittal of the reports should be sustained. I therefore dissent.

Section 3215(e): Insurance

I join the majority in holding that Morgan Plant has standing to challenge subsection (e) of section 3215 and in striking down that subsection.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 82-1785 and 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellants in No. 82-1785
and Cross-Appellees in
No. 82-1856

V.

RICHARD THORNBURGH,
H. ARNOLD MULLER,
HELEN B. O'BANNON,
MICHAEL J. BROWNE,
WILLIAM R. DAVIS,

LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellees in No. 82-1785
and Cross-Appellants
in No. 82-1846

On Appeal from the District Court for
the Eastern District of Pennsylvania
(D. C. Civil No. 82-4336)

Present: SEITZ, Chief Judge, HIGGINBOTHAM and SLOVITER, Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel March 11, 1983 and reargued before the same panel November 21, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered December 7, 1982, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Each side to bear its own costs.

ATTEST:

/s/ Sally Mrvos
Clerk

May 31, 1984
Certified as a true copy and issued in lieu of a forma mandate on July 6, 1984.

Test: /s/ M. Elizabeth Fergusen

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 82-1785 and 82-1846

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

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in No. 82-1846

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges.

The petition for rehearing filed by appellees-cross-appellants in the above-entitled case having been

submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Aldisert and Judge Gibbons dissent from the denial of the petition for rehearing.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: June 28, 1984

American College of Obstetricians, etc. v. Thornburgh, Nos. 82-1785 and 82-1856

Statement by Judge Adams Sur Denial of Petition for Rehearing

Eleven years ago, the Supreme Court, in Roe v. Wade, 410 U.S. 113 (1973), struck down a statute imposing severe criminal sanctions on physicians who performed abortions. That statute, in the eyes of the Court, impermissibly interfered with a woman's decision to terminate her pregnancy, thus abridging the fundamental right of privacy that guarantees freedom of choice in marriage and family life. Today, in the decision we are reviewing on a petition for rehearing, the majority declares a Pennsylvania statute constitutionally infirm because, among other reasons, it requires that physicians supply printed material to women seeking abortions that need be read only if the patient so desires.

I agree with the majority that certain portions of the statute cannot be reconciled with recent Supreme Court decisions, a judgment that even the State concedes. However, to strike down the statute practically in its entirety is to forget how tightly constitutional adjudication is bound to the facts of those cases in which new constitutional principles are announced or developed. Such sweeping rejections of legislative enactments often result from the common tendency to generalize the holdings of cases and to drive those generalizations to an extreme which, while perhaps exhibiting conceptual purity, belies the emptiness of logical constructs devoid of empirical content. All rights by their nature tend to declare themselves absolute to their logical extreme; yet, in fact, they are all limited by competing rights as well as policy considerations.

The Supreme Court has identified two compelling state interests which, when pursued with scrupulous care, may justify regulations governing the exercise of the fundamental right to an abortion: the health of the pregnant woman seeking an abortion and the protection of fetuses capable of meaningful life. City of Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2491-92 (1983). The Commonwealth of Pennsylvania has chosen to protect those interests by, for instance, specifying some of the information that must be made available before a woman's consent to an abortion is legally informed and by providing that a second physician, absent an emergency, shall attend the operation if a child might survive the abortion. Not all might agree with these measures, but a law is not void simply because it "may

seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." Otis v. Parker, 187 U.S. 606, 608 (1903) (Holmes, J.). The Constitution does not embody a particular set of ethical principles, and judges are under a special duty in passing on the legitimacy of legislation not to constitutionalize that which legally speaking is in the end only a personal preference.

I vote for rehearing in this matter not only for the reasons set forth by Judge Weis, but also because, as I view it, the case involves questions of more than usual importance whose resolution requires that competing, legitimate interests be delicately balanced.

STATEMENT OF JUDGE WEIS
SUR PETITION FOR REHEARING

As an intermediate appellate court, we are bound to apply the Supreme Court's standards to the provisions of the Pennsylvania statute. However, I have serious reservations about the fashion in which the panel majority applied those standards to the many issues presented by this case. In the present procedural posture, however, I will discuss only a few of the questions that I believe warrant in banc consideration.

One major concern is the matter of "informed consent." I confess that I find some incongruity in the Supreme Court's exclusion of certain information that has a definite and direct bearing

on whether the consent of the woman is truly knowledgeable. See Akron v. Akron Center for Reproductive Health, 51 U.S.L.W. 4767 (June 15, 1983). Suppression of objective information highly pertinent to important decisions is indeed a disturbing and unwelcome concept in American law. In expanding that notion beyond the bounds set by the Supreme Court, the panel majority contravenes the teachings of Akron and other cases. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976) ("The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences.")

Although Akron disapproved state requirements that were "designed not to inform the woman's consent but rather to

persuade her to withhold it altogether," the Court did not prohibit all mandatory disclosures. Found "not objectionable" were some of the items that are listed in the Pennsylvania statute. Compare Akron, 51 U.S.L.W. at 4775 n.37 with 18 PA. CONS. STAT. ANN. §3205.

Moreover, the panel majority has ignored significant differences between the information specified in the Akron and Pennsylvania enactments. The Akron ordinance was overturned because it exhibited specific objectionable characteristics, none of which are present in the Pennsylvania statute. Here, the legislature has limited the required disclosure of risks to instances "when medically accurate," 18 PA. CONS. STAT. ANN. §3205(a)(1)(iii), thereby preserving the professional judgment of the physician. Nor can the Pennsylvania provision fairly be

characterized as an attempt to misleadingly overstate the nature of abortion as a medical procedure.

In referring to the anatomical and physiological characteristics of the unborn child, the Pennsylvania Act provides only that materials on this subject be made available to the woman, who is free to choose whether she will view them. The Act states that the materials "shall be objective, nonjudgmental and designed to convey only accurate scientific information." 18 PA. CONS. STAT. ANN. §3208(a)(2). Thus, the statute does not admit of the overreaching found objectionable in Akron.

To the extent Pennsylvania requires that information be given on the gestational age of the fetus, adoption, and the availability of assistance during pregnancy and after

childbirth, the statute incorporates only matters that the Court in Akron found "not objectionable." Given these circumstances, I am at a loss to understand why the Pennsylvania informed consent provisions are held to be beyond permissible limits.

Applying the Akron yardstick to the Pennsylvania statute requires a review of the various provisions of the Pennsylvania statute independently, and on their own merit. That has not been done here; nor has there been persuasive analysis of why the severability provision of the Pennsylvania statute should not be honored.

The statute here also differs from the Akron ordinance in establishing civil as well as criminal consequences. In a severable clause, Pennsylvania provides that compliance with the required disclosures is a defense for

the physician in a civil malpractice suit. See 18 PA. CONS. STAT. ANN. §3205(d). A state's imposition of criminal sanctions that effectively deny the exercise of a constitutional right is quite a different jurisprudential consideration than setting standards for civil damage liability. No recognition of that distinction is apparent in the majority's approach. Cf. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 88 (1976) (Missouri statute provided that "[n]othing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.").

A second major concern is the treatment of the parental consent provisions. See 18 PA. CONS. STAT. ANN. §3206. Although this section is not

rejected as facially unconstitutional, implementation is enjoined pending promu' ation of rules by the state Supreme Court. I perceive no necessity to await such rules.

The Pennsylvania act is not less detailed in any constitutionally significant way than the parental consent provisions upheld by the Supreme Court in Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 51 U.S.L.W. 4783 (June 15, 1983). Compare 51 U.S.L.W. 4784 n.4 with 18 PA. CONS. STAT. ANN. §3206. The Pennsylvania statute provides the minor with a judicial alternative to parental consent and gives her the opportunity to demonstrate sufficient maturity to make the abortion decision. Absent that demonstration, the judicial officer is required to determine whether an abortion is in the woman's best

interests. These are the essential requirements enunciated by the Supreme Court. See Akron, 51 U.S.L.W. at 4773.

The rules, which are to be issued by Pennsylvania's highest court "as may be necessary," are to address the confidentiality and promptness of the judicial procedures. 18 PA. CONS. STAT. ANN. §3206(h). The Act, however, already unambiguously provides that the "[c]ourt proceedings . . . shall be confidential and shall be given . . . precedence over other pending matters." Id. §3206(f). In highly specific language, the statute states that "in no case shall the court fail to rule within three business days of the date of application." Id. In addition, there is the requirement of a "sealed record" and the availability of an "expedited confidential appeal" for minors who are denied an abortion.

The statute as written satisfies the constitutional principles we are to apply to the issue of parental consent. That the Pennsylvania legislature has authorized "such rules as may be necessary" to supplement the statutory provisions does not permit this court to delay the effective date once federal constitutional requirements have been met. Although I have doubts that a construction to avoid constitutional infirmities is necessary here, one is easily accomplished by the reasonable assumption "that a state court presented with a state statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute consistently with constitutional requirements." Akron, 51 U.S.L.W. at 4774.

Along with Judge Seitz, I fail to understand why the majority strikes

down reporting provisions in section 3214 of the Pennsylvania Act when any cost increase attributable to these requirements is not known. That the majority may also have ruled on questions not raised by the parties causes concern that it has gone beyond the proper bounds for testing the validity of a state statute.

Perhaps most significant, in my opinion, is the panel's general failure to give proper weight to the legislative decision, as expressed in the statute, to protect the life and health of the woman and the child subject to abortion. The state is not disinterested in the abortion decision but has an important and legitimate interest in protecting "the potentiality of human life." Akron, 51 U.S.L.W. at 4770; Roe v. Wade, 410 U.S. 113, 162 (1973). Although the woman is protected

from "unduly burdensome interference with her freedom to decide" whether to abort, that right "implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." Maher v. Roe, 432 U.S. 464, 474 (1977). "The Constitution does not compel a state to finetune its statutes so as to encourage or facilitate abortions." H.L. v. Matheson, 450 U.S. 393, 413 (1981).

Some appreciation of the magnitude of the state's interest may be gleaned from the fact that in Pennsylvania alone there were 59,288 abortions in 1983. In the United States, 1,574,000 abortions were performed in 1982. By way of contrast, the number of deaths from automobile accidents in the United States in that

same year, a state concern often referred to as "slaughter on the highways," was 43,945.

Our function as a federal court is to determine whether a state statute violates the federal constitution. If a statute may be construed to be constitutional, then we must adopt that interpretation. "Courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected." In re Gault, 387 U.S. 1, 71 (1967) (Harlan, J. concurring).

The issue in this case, only a few of which I have discussed, are important and significant. Because they have far-reaching effects and implicate the proper role of the states and the

federal courts, the full court should be review this case. Accordingly, I dissent from the order denying in banc consideration.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.	:	CIVIL ACTION
	:	NO. 82-4336
V.	:	
RICHARD THORNBURGH, et al.	:	

MEMORANDUM

HUYETT, J. December 10, 1982

I. INTRODUCTION

This is an action for declaratory and injunctive relief pursuant to the United States Constitution and 42 U.S.C. § 1983 in which the plaintiffs challenge the constitutionality of the Pennsylvania Abortion Control Act (Act), 18 Pa. Con. Stat. Ann. §§ 3201-3220. I have subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), & 1343(a)(4). Before me is plaintiffs' motion for preliminary injunction. On

December 7, 1982, because the Act was to take effect the next day, I issued my order and decree on the plaintiffs' motion. This opinion is the statement of my reasons for ruling as I did.

The plaintiffs are physicians, a physicians' professional organization, several clinic providers of first-trimester abortions members of the clergy and an individual whose health care and disability insurance provides comprehensive abortion coverage. The named defendants are seven state and local officials sued personally and in their official capacities (hereafter sometimes referred to collectively as the Commonwealth). Several physicians and a pregnancy counseling service moved to intervene as defendants and for appointment as guardians ad litem. The motion was denied, however, the applicants for intervention (hereafter

amici) were granted amici curiae status.

The act became law on June 11, 1982. Almost four months later plaintiffs filed their complaint. Plaintiffs' motion for a preliminary injunction was filed on October 29, 1982, almost a month after the complaint was filed. Following a conference in chambers on November 17, 1982, it was determined that December 2, 1982 was the earliest date by which the parties could fully brief the complex constitutional issues and prepare the factual presentation required by the motion. The parties' stipulation of uncontested facts,[1] their proposed findings of

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[1]The parties' stipulation is cited throughout simply by paragraph symbol (para.) and number. The stipulation was entered into solely for the purpose of the motion for preliminary injunction. My adjudication is likewise limited.

fact and conclusions of law were submitted to me on November 30, 1982. A conference was held in chambers on December 1, 1982. On December 2, 1982, I held a hearing on plaintiffs' motion. Because of the parties' comprehensive stipulation of uncontested facts, no testimony or evidence was submitted at the hearing. Counsel for the plaintiffs, defendants, and amici presented oral argument. At the conclusion of the December 2, 1982 hearing, I took the matter under advisement. The effective date of the Pennsylvania Act is December 8, 1982.

The following constitutes my findings of fact and conclusions of law. Based upon my findings and for the reasons stated below, I conclude that the Act as a whole and the specific subsections challenged are constitutional with the exception of the

24 hour waiting period in § 3205.

I reach this conclusion after the most thoughtful consideration of these complex issues which time permitted.
As the procedural history of this case outlined above reveals despite the complexity and importance of the issues, this case has proceeded rapidly under pressure from the effective date of the Act. Within only 2 months of the filing of the complaint and just 6 days after the case was submitted to me, the Act which plaintiffs contend violates the Constitution became law.

Although the Pennsylvania Act and the challenge to it are recent developments in this circuit, some but not all of the subsections challenged here are similar to provisions the constitutionality of which has been litigated in the Six Circuit in Akron Center for Reproductive Health, Inc. v.

City of Akron, 651 F.2d 1198 (6th Cir. 1981) (Akron Center v. Akron) and in the Eighth Circuit in Planned Parenthood Association v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) (PPA v. Ashcroft). The decisions in Akron and Ashcroft are not consistent on a number of common issues. These decisions have tended as much to obfuscate as to enlighten my analysis of the present case. Both decisions are before the Supreme Court which heard argument in the cases on December 4, 1982. 51 U.S.L.W. 3433 (U.S. Dec. 7, 1982).

While the pressure of the effective date is real and the plaintiffs are entitled to an adjudication of their request for relief pendente lite, it is with a certain level of frustration that I observe that within six months to a year the Supreme

Court may issue an opinion which will be likely to resolve many of the issues that I have held under advisement for just a few days. Further, I must agree with Judge Adams' observation in Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554, 586 (E.D. Pa. 1975) (Adams, J., concurring and dissenting), that "it is open to some doubt whether the courts are the institution best equipped to resolve the complex societal interests that exist in the abortion field." This is an area perhaps better left in the hands of popularly elected legislators. In approaching this decision, I was mindful of Judge Adams' admonition in Fitzpatrick that courts should be "reluctant to leap ahead too quickly to interdict states from legislating respecting abortions when, in the accumulative informed judgment of the legislators, such enactments are

necessary to serve legitimate interests of populance." Id.

II. STANDING

The plaintiffs in this action can be divided into five different groups. The defendants challenge the standing of only one of those groups, clergymen who sue in individual and representative capacities.

Plaintiff physicians have standing to assert both their own rights and those of their women patients to challenge the constitutionality of the sections at issue in this case. Singleton v. Wulff, 428 U.S. 106 (1976), Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Plaintiff American College of Obstetricians and Gynecologists, Pennsylvania Section, an organization of obstetricians and gynecologists, has standing to represent the interests of its members and of their patients. Hunt v. Washington State Apple Advertising

Commission, 432 U.S. 333 (1977). Plaintiff medical providers similarly have standing to raise the constitutional rights of their customers. Women's Medical Center v. Roberts, 512 F. Supp. 316 (D.R.I. 1981).

The defendants have not challenged the standing of plaintiff Morgan Plant. Plant is an individual who currently purchases and will continue to purchase health care and disability insurance, which comprehensively covers abortions, from an insurer in Pennsylvania. Plant sues on her own behalf and on behalf of all persons similarly situated. It appears that Plant does not have standing to challenge § 3215(e), because there is no evidence that comprehensive insurance premiums will be more costly after the Act goes into effect than before the enactment as a result of the challenged

provision. Consequently, Plant has not shown the "injury in fact" required by Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) and its progeny. Nevertheless, in the absence of briefing or oral argument on this point by any of the parties, and in light of the time constraints involved, I will reach the merits of the insurance claim.

Finally, I conclude that plaintiff clergymen do not have standing either as individuals or on behalf of women whom they counsel. Plaintiff clergymen fail to meet the constitutional requirements for standing, in both individual and representative capacities, articulated in free exercise cases. I find that the challenged provisions have no direct impact on the plaintiff clergymen as individuals, because the Act has no

provisions which directly or indirectly concern religious counseling. Consequently, I conclude that the clergymen have failed to meet the requirements of injury in fact required in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

Further, I conclude that the clergymen do not have standing in a representative capacity. A free exercise claim ordinarily requires individual participation. Harris v. McRae, 448 U.S. 297, 321 (1980). "It is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." Abington School District v. Schempp, 374 U.S. 203, 233 (1963). In Harris v. McRae, the Supreme Court held that representatives of a division of the United Methodist Church did not have

standing to sue on behalf of women who seek abortions for religious reasons. Consequently, a free exercise claim in this case can be pursued only by a woman who seeks "an abortion under compulation of religious belief." 448 U.S. at 320.

I, therefore, conclude that the plaintiff members of the clergy lack standing. Thus, I need not address the merits of the plaintiffs' arguments concerning the Free Exercise Clause because no plaintiff has standing to raise it.

III. STANDARD OF REVIEW

The standard of review applicable to each of the plaintiffs' challenges must be determined. The parties stated at oral argument that they are in disagreement over the proper standard. The plaintiffs contend that if the state has imposed a legally significant burden on a fundamental right such as a woman's right of privacy, then the burden must be related to a compelling state interest and the statutory section imposing the burden must be narrowly drawn to achieve that compelling interest. The Commonwealth contends that the appropriate inquiry is whether the Act imposes an "undue burden."

I do not believe that a meaningful distinction can be made between the plaintiffs' "legally significant burden" and defendants' "undue burden." I will employ the

plaintiffs' term.

If a legally significant burden on the exercise of a fundamental right is found to exist, then plaintiffs are correct that the compelling state interest standard is applied to determined the constitutionality of the statute imposing the burden. If no burden is found and no suspect class is involved, the issue is simply whether the state had a rational basis for making the classification contained in the statute. See J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 68 (1978).

The right to privacy which encompasses a woman's decision to terminate her pregnancy is a fundamental right. The imposition of a legally significant burden on that right would have to be justified by a compelling

state interest. See Maher v. Roe, 432 U.S. 464 (1977). In Roe v. Wade, the court held no compelling state interest justified a sweeping prohibition of abortion. In the first trimester, the Court concluded that little or no regulation was permissible. The Court went on, however, to conclude that even when judged against the demanding compelling state interest test, "the State's dual interest in the health of the pregnant woman and the potential life of the fetus [are] sufficient to justify substantial regulation of abortions in the second and third trimesters." Maher v. Roe, 432 U.S. at 472. Each interest, health of the woman and life of the fetus, becomes compelling at some point in the pregnancy. Roe v. Wade, 410 U.S. at 162-63. As the interest becomes "compelling" it justifies some

interference with the woman's fundamental right by way of regulation.

> In the second trimester, the State's interest in the health of the pregnant woman justifies state regulation reasonably related to that concern . . . . At viability, usually in the third trimester, the State's interest in the potential life of the fetus justifies prohibition with criminal penalties, except where the life or health of the mother is threatened.

Id. at 162-64.

Thus, the right to privacy which protects a woman's decision to terminate her pregnancy, while fundamental, is not absolute. In other areas of constitutional law, if the compelling state interest or "strict scrutiny" standard applies, it has nearly always been fatal to the state law or act under consideration. See L. Tribe, American Constitutional Law 1000 (1978). In the area of abortion decisions, a compelling state interest has been found to support

the challenged state law or act. See PPA v. Ashcroft, 655 F.2d 848 (8th Cir. 1981).

The fact that the right involved here is not absolute effects as well the analysis of whether a legally significant burden has been imposed which would trigger strict scrutiny. The Court has observed that "[a]lthough the state-created obstacle need not be absolute to be impermissible, we have held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'" Maher v. Roe, 432 U.S. at 473. See also Beal v. Doe, 432 U.S. 438 (1977). The Court has also stated that whether a state's regulation of abortion will be found to be constitutional will "depend upon its degree and the justification for it." Id. Thus, to

determine what constitutes a legal significant burden, one must look to the right allegedly burdened. In the case of the right to privacy to choose an abortion, the existence of a legally significant burden will be a matter of degree.

IV. 24-HOUR WAITING PERIOD - § 3205

Section 3205 of the Act requires that there be a 24-hour waiting period between the time a woman seeking an abortion is provided the information specified in that section and the time the abortion is performed. Section 3205 applies to all abortions regardless of which trimester of pregnancy is involved.

Plaintiffs contend that because this provision precludes the performance of an abortion, albeit for a temporary period, it imposes a legally significant burden on the effectuation of the abortion decision. Defendants contend that the 24-hour waiting period serves several useful purposes consistent with the Commonwealth's desire to further the public policy of encouraging childbirth over abortion. Additionally, the Commonwealth contends that a waiting period promotes truly informed

decision-making by the woman.

A mandatory 24-hour waiting period could have the effect of a much longer delay because of the nature of the working schedules of clinics and physicians. The 24-hour waiting requirement will require clinics and physicians to change their current practices and may increase the cost the clinics and physicians. They intend to pass along the increased costs to their patients. (para. 131) Moreover, this provision, because it requires at least two visits to an abortion provider, will require women who must travel long distances to make two trips or to incur additional expense for overnight lodging in order to effectuate their abortion decision. The economic impact of this provision is further increased as it may require women who are employed to take additional time off from work. (paras.

123, 124).

More fundamentally, the record demonstrates that the delay occasioned by this provision is contrary to the best medical interests of women seeking abortions.

National studies show that the earlier an abortion is performed, the safer it is. (para. 88) Each week of delay in performing an abortion increases the complication rate by 15 - 30% and the death rate by 50%. (para. 89) I find that the 24-hour delay imposed by the statute would have a substantial impact on the health of a woman seeking an abortion. The risks of complications and mortality increase substantially with each week of delay in the performance of the abortion. (para. 89) In some cases, the delays caused by this requirement may cause patients to enter into the second trimester of

pregnancy thereby substantially increasing the cost of the procedure and making the procedure more dangerous. (paras. 89, 123) Thus, a 24-hour delay, which stands to grow to a considerably longer delay because of the practices of the abortion providers, directly harms the medical interests of women.

Virtually every federal court which has been required to pass on similar provisions has found them unconstitutional. In Akron Center v. Akron, the Sixth Circuit stated that the obvious effect of a 24-hour wait is to impose upon the process of obtaining an abortion a delay which has no medical basis. 651 F.2d at 1208. The court concluded that although a period of delay before surgery is often beneficial, an inflexible requirement of

a 24-hour waiting period for an abortion does not serve the compelling state interest which is required under strict scrutiny analysis. Id.

Similarly, the court in PPA v. Ashcroft stated that a 48-hour waiting period requirement in that case was unconstitutional because it increased delay and delay increased the risk to the woman. 655 F.2d at 866.

The weight of authority holds and I conclude that the 24-hour waiting period which imposes a mandatory, temporary denial of an abortion is a legally significant burden on a woman's right to seek an abortion. There is no state interest during the first trimester of pregnancy which justifies this burden. Further, the 24-hour waiting period has a detrimental effect on the health interests of women seeking

abortions. Thus, it is contrary to the state's compelling interest in the second trimester, maternal health. For these reasons and based on the record produced before me, I conclude that the plaintiffs have shown a likelihood of success on the merits of their claim that the 24-hour waiting period is unconstitutional.

V. DOCTOR-ONLY REQUIREMENT - § 3205(a)(1)

Plaintiffs challenge the provision of § 3205(a)(1) requiring that the information required to be disclosed to the patient by subsection (a)(1) be imparted by the physician and not his agent.

The plaintiffs maintain that this "doctor-only" requirement will have a legally significant impact on the operation of medical providers which use trained counselors rather than physicians to discuss the abortion decision with patients and to secure a woman's informed consent. Plaintiffs argue that this requirement will result in an increase in the cost of abortions and will thereby restrict access to abortions without any legitimate state justification. Defendants, on the other hand, argue that the requirement does not interfere with the woman's abortion

decision is justified by a legitimate state policy of insuring physician-patient consultation, and thereby promotes the state's interest in the health of its citizens and is permissible under existing decisional law.

The parties have stipulated that the doctor-only requirement will require the plaintiffs to change their current practices. The parties further agree that such a change will increase costs to the plaintiff clinics, which costs will be passed along to women patients. (Stip. § 120)

Nevertheless, I conclude that the "doctor-only" requirement does not create a legally significant burden on the right recognized in Roe v. Wade. Section 3205(a)(1) does not interfere with the woman's fundamental right to

decide to have an abortion. Upon review of the stipulations of the parties, I am not convinced that the doctor-only requirement will require a presentation by the physician so lengthy as to become unduly burdensome or expensive. Further, the magnitude of any cost increase is speculative at best.

Instead, the only certain impact of the doctor-only requirement is that the physician's work may become more laborious. This result, however, does not burden the woman's abortion decision. Further, as defendants point out, a statute which makes a "physician's work more laborious and less independent" does not itself violate the Constitution." Whalen v. Roe, 429 U.S. 589, 604-605 n.33 (1977).

The doctor-only requirement fulfills the state's legitimate interest

in the health of its citizens by insuring that the abortion decision is made after a patient-physician consultation. In Ashcroft, the Eighth Circuit upheld a provision that required the attending physician to inform the woman of the particular risks associated with the abortion technique to be used, and alternatives to abortion. The court stated that the minimal requirement was "consistent with the principle that the abortion decision is one to be made by a woman and her physician, and advances the state's interest in insuring that the decision is made with 'full knowledge of its nature and consequences.'" 655 P.2d at 869, citing Planned Parenthood v. Danforth, 428 U.S. at 67.

For all these reasons and based on the record produced before me, I

conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the doctor-only requirement is unconstitutional.

VI. INFORMED CONSENT - SPECIFIC INFORMATION - § 3205(a)(1) & (2)

Section 3205(a)(1) requires that "except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if the woman is provided" with five pieces of information including "(1) the name of the physician who will perform the abortion; (ii) the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable; (iii) the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility; (iv) the probable gestational age of the unborn child at the time the abortion is to be performed; and (v) the medical risks

associated with carrying her child to term."

The plaintiffs maintain that the information required to be disclosed pursuant to § 3205(a)(1) imposes a legally significant burden on the abortion decision because the rigidity it injects conflicts with the need for individualized dialogue between doctor and patient. Plaintiffs also contend that this section interferes with the physician's ability to exercise his best medical judgment in determining the needs of his or her patient and satisfying those needs. Further, plaintiffs contend that the informed consent requirements of § 3205(a)(1) exceed those imposed to secure informed consent for other surgical procedures in Pennsylvania. Plaintiffs argue that the information is intended only to skew the

woman's abortion decision. The defendants, on the other hand, maintain that the informational requirements do not restrict the physician's ability to exercise his or her medical judgment or impermissibly exceed the informed consent requirements in other areas. The defendants also maintain that each of the requirements in § 3205(a)(1) is constitutionally permissible under existing decisional law.

A fundamental aspect of informed consent is that a patient be told of the options available to her. (para. 97). In general, physicians prefer broad disclosure of risks and options but agree that the disclosure process should not be a rote recitation, either orally or in writing of the risks of a medical procedure. Instead, the physician and the patient should have a thoughtful

discussion which involves great sensitivity, sublty, and sometimes complexity about a matter of great importance to the patient. (para. 99)

Thus, I find that consent cannot be truly informed unless the patient is given information regarding the risks inherent in the proposed procedure and the alternatives to the procedure. Women who undergo abortions are not always told of the alternatives to abortion or of the full nature and effect of the procedure they will undergo. (para. 102) In fact, some of the women who do undergo abortions would not have had an abortion if they were provided with all the information required to be provided by the Act. (para. 106)

Based on considerable case law which has addressed similar informa-

tional requirements necessary for informed consent, I conclude that the informational requirements of § 3205(a)(1) appear to be constitutional. In Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981), the court upheld similar informational requirements concerning the type of procedure which the physician intends to use to perform the abortion, the possible complications associated with the use of the procedure and with the performance of the abortion itself, the availability of alternatives to abortion and a statement that a woman's refusal to undergo an abortion does not constitute grounds for the denial of public assistance. The court found each of these pieces of information unobjectionable and relevant to the outcome of the woman's decision.

The Bellotti court invalidated, however, a requirement that the informed consent form contain "a description of the stage of development of the unborn child." Id. In addition to Bellotti, other courts have invalidated similar fetal description provisions. Each of the cases held unconstitutional a requirement that a woman read statements concerning "organic pain to the fetus" and view material describing "probable anatomical and physiological characteristics of the fetus." Similar provisions were held unconstitutional in PPA v. Ashcroft, 655 F.2d 848 (8th Cir. 1981). In Ashcroft and Akron, both currently pending in the Supreme Court, the information required to disseminated included graphic descriptions of the particular fetus.

Section 3205(a)(1)(iv) by contrast, requires a statement of "the probable gestational age of the unborn child at the time the abortion is to be performed," not a graphic description. In Women's Medical Center of Providence v. Roberts, 530 F. Supp. 1136 (D.R.I. 1982), the court upheld a provision requiring that a woman know the "probable gestational age of the fetus at the time the abortion is to be performed." The court emphasized that the provision did not require discussion of anatomical and physical characteristics of the fetus but rather, concerned information routinely supplied to women seeking abortions.

I conclude that the requirements of § 3205(a)(1) are neither contrary to accepted medical practice nor an attempt to skew the woman's abortion decision.

The provision does not require a physician to read any prescribed statement to the patient or require that the form be received or signed at the physician's office. Section 3205(a)(1) merely requires that the woman be provided with the information by the physician. Further the physician remains completely free to give any additional information regarding abortion to the woman. Thus, it appears that this requirement is "consistent with the idea that the abortion decision is one to be made by a woman and her physician and advances the state's interest in insuring that the decision is made with "full knowledge of its nature and consequences." PPA v. Ashcroft, 655 F.2d at 869, citing Planned Parenhood v. Danforth, 428 U.S. at 67.

In addition, although not raised at oral argument, the plaintiffs challenge § 3205(a)(2) in their brief.

Section 3205(a)(2) provides, inter alia, that the physician inform the woman (1) of her right to review printed materials describing the unborn child and (2) of agencies which offer alternatives to abortion. I conclude that these requirements appear to be contrary to the plaintiffs' argument, the provisions do not burden the woman's abortion decision, but merely inform the woman of the availability of additional detailed information of a general nature. I note that in Charles v. Carey, 627 F.2d 772 (7th Cir. 1980), the Seventh Circuit held that requiring women undergoing abortions to read printed materials "pertaining to abortion and how to contact various maternal assistance agencies," did not burden the woman's abortion decision. Id. at 783. The court did, however, invalidate a provision requiring the woman to view

materials produced by the state showing probable anatomical and physiological features of the fetus at various gestational ages. The court stated, in part, "The prospect of such 'required reading' for the woman who elects to abort a fetus because of serious genetic defects or because her own health is in danger is punitive to the woman and compromising to the physician's efforts to do what is best for her." Id. at 784. Section 3205(a)(2)(iii), however, involves no "required reading," but merely requires that the woman be informed that she may review the materials if she so desires.

In summary, the requirements of § 3205(a) do not interfere with the woman's fundamental right to decide to have an abortion Instead, the provisions merely achieve the legitimate state interest of insuring that the woman's

decision is made with full knowledge of the nature and consequences of her decision and after consultation with her physician. For all these reasons and based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that subsections (a)(1) & (2) of § 3205 are unconstitutional.

VII. PARENTAL-JUDICIAL CONSENT - § 3206

Section 3206(a) of the Act provides that, except in the case of a medical emergency, a physician shall not perform an abortion upon an unemancipated or incompetent minor without first obtaining the consent of one of the minor's parents or, in the case of an incompetent minor, the consent of her guardian. The Act specifically provides that in the event neither parent "is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient." 18 Pa. Con. Stat. § 3206(b). Section 3206(c) provides that if both parents of the minor refuse to consent, or if the minor prefers not to seek the consent of either parent, the minor may petition the court to authorize the abortion; the

court "shall" authorize the abortion "if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." Finally, according to § 3206(d), if the court determines that the minor is "not mature and capable of giving informed consent," the court is nevertheless required to authorize the abortion if the abortion "would be in the best interests of the [minor]."

The plaintiffs maintain that this requirement violates the minor's fundamental right to privacy by authorizing a third-party veto of her decision to undergo an abortion and must therefore be enjoined. In addition, the plaintiffs maintain that the judicial consent provision in § 3206 would present financial, transportation and logistical problems for teenagers,

resulting in time delays which will have serious health and emotional consequences for minors. Plaintiffs further claim that the section is void for vagueness. Finally, they argue that judicial approval serves no legitimate state interest since § 3204 of the Act already requires a physician to consider the age of his or her patient and determine whether in his or her best clinical judgment, the abortion is necessary.

The defendants contend, however, that the consent requirements of § 3206 comply with the most recent guidelines set by the Supreme Court regarding parental and judicial consent procedures. They maintain that the judicial approval procedures do not significantly burden the abortion decision, are not vague and express a legitimate state interest.

I conclude that the parental and judicial consent provisions of § 3206 are constitutional. I note that Justice Powell in Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II), stated guidelines that a parental consent provision should meet in order to be constitutional. I have determined that the provisions of § 3206 meet the requirements of Bellotti II.

The Bellotti II standards are set forth in Justice Powell's opinion in that case. Justice Powell's opinion which was joined in by three other justices is a thoughtful consideration of permissible state action with respect to a minor's decision to seek an abortion. Although it is not a majority opinion of the court, it is persuasive authority. I have given it careful consideration and have determined that it is sound. I conclude that the

Pennsylvania Act is consistent with standards in Justice Powell's opinion in Bellotti II. I note also that since Justice White would have upheld the parental consent statute in Bellotti II which was more onerous to a minor seeking an abortion than the parental consent provision described by Justice Powell as acceptable, one could conclude that Justice White would uphold the parental-judicial consent provision of the Act.

In particular, Justice Powell wrote in Bellotti II that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." 443 U.S. at 643 (footnote omitted). Consequently, in Akron, the parental consent provision was held

invalid, because it failed to include a judicial approval alternative to parental consent. The Commonwealth, however, has provided such an alternative procedure in § 3206(c)-(f) of the Pennsylvania Act. Furthermore, under Bellotti II the minor must be able to obtain judicial authorization for the abortion if "she is mature enough and well enough informed to make her abortion decision . . . independently of her parents' wishes." The Act specifically complies with this portion of Bellotti II by providing that the court "shall . . . authorize a physician to perform the abortion if the court determines that the [minor] is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent." 18 Pa. Con. Stat. § 3206(c) (emphasis added).

Bellotti II also requires that the minor must be able to obtain authorization for the abortion under the alternative procedure "even if she is not able to make this decision independently, [but] the desired abortion would be in her best interests." 443 U.S. at 643-44. Again, § 3206(d) of the Act specifically provides that the court "shall" authorize the abortion "[i]f the court determines that the performance of an abortion would be in the best interests of the [minor]." Thus, § 3206 recognizes that every minor must have the opportunity, if she so desires, to go directly to a court without first consulting or notifying her parents. Further, unlike the provision at issue in Ashcroft, the court may not capriciously or arbitrarily withhold its approval. In Ashcroft, although the

statute included a judicial approval alternative, the provision improperly allowed the court to withhold its consent "for any good cause," in violation of the guidelines established in Bellotti II.

Finally, under Bellotti II, the alternative procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644. Section 3206(f) of the Act specifically requires that court proceedings under § 3206 be confidential and be of adults. Consequently, the state has an interest in ensuring that the judgment of minors is informed and rational. The parental-judicial consent provision attempts to ensure that the minor's abortion decision is mature and well-reasoned by providing for judicial approval when parental consent is not

feasible.

I also conclude that the Act is not unconstitutionally vague because it fails to provide standards for determining when a minor is "mature" or "emancipated." I am satisfied that the words "emancipated" and "mature" are adequately defined by reference to existing state law on the subjects. In addition, as the Supreme Court indicated in Bellotti II, ". . . the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors." 443 U.S. at 643-44 n.23. Indeed, although a "State generally may resort to objective . . . criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority," it is not required to adopt such "inevitably

arbitrary" criteria. 443 U.S. at 643 n.23 (emphasis added). The exact same reasoning applies to the concept of emancipation, which is merely a shorthand description for "criteria . . . for lifting some or all of the legal disabilities of minority." Id.

Thus, the parental-judicial consent provision of the Act appears to have been carefully crafted to comply with the guidelines established in Bellotti II and is not void for vagueness. Consequently, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of this claim.

VIII. REPORTING REQUIREMENTS - §§ 3207(b) & 3214

Section 3207(b) requires every facility in Pennsylvania at which abortions are performed to report to the Department of Health of the Commonwealth of Pennsylvania: (1) the name and address of the facility; (2) the name and address of any parent, subsidiary or affiliated organizations, corporations or associations; and (3) the name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility. Section 3207(b) further requires that the reports shall be open to public inspection and copying.

The plaintiffs maintain that these reporting and disclosure require-

ments are designed to focus public scrutiny on facilities, and owners of facilities, that perform abortions for the purpose of pressuring and harassing them. The defendants, however, maintain that the reporting provisions do not invade the privacy of facility owners because they are not more detailed than similar provisions relating to owners of other business entities. The defendants also maintain that the occurrence of any harassment as a result of the provision is merely speculative.

I conclude that § 3207(b) imposes no legally significant burden on the abortion decision. This provision has no effect upon the woman who is seeking an abortion. It does not unduly burden health providers who perform abortions. The information has no effect upon the woman who is seeking an abortion. It

does not unduly burden health providers who perform abortions. The information required by § 3207(b) is no more detailed or intrusive than the Commonwealth requires in other areas, such as the requirements involving articles of incorporation under the Nonprofit Corporation Law, Pa. Stat. Ann. tit. 15, § 7316 or the requirements involving the formation of limited partnerships under the Uniform Limited Partnership Act, Pa. Stat. Ann. tit. 59, § 512. I note that the state has a legitimate interest in ensuring that all businesses are financially responsible and law-abiding. I conclude that the record keeping provisions at issue help the state in achieving this interest. Further, there is no evidence in the record which would allow me to conclude that § 3207(b) is designed to harass or pressure abortion performing facilities

and their owners or that imposition of the requirements would result in pressure or harassment. Consequently, I conclude that § 3207(b) does not impose a legally significant burden on the abortion decision, and is related to a legitimate state interest.

The plaintiffs also challenge § 3214, which requires, inter alia, that for each abortion, the doctor must file a record including his identify, the identity of the referring physician, the name of the facility where the abortion was performed, and the womar's age, race, marital status, number of prior pregnancies and residence. Although some of the information in these r is available for public inspection, subsection 3214(a) requires that the report form shall not identify the individual patient by name. In addition, subsection (e)(1) provides

that statistical reports, prepared by the Department of Health based on the data gathered from reports filed pursuant to subsection (a), shall not lead to the disclosure of the identity of any person filing a report or about whom a report is filed. Further, subsection (e)(2) provides that before public disclosure of the reports filed pursuant to subsection (a) the department shall substitute a unique identification number for the names of the physicians which appear on the report, so that the identify of the physician filing the report shall constitute a confidential record of the department.

The plaintiffs maintain that compelled extensive disclosure of this information creates a legally significant burden on a woman's right of privacy. Defendants, on the other hand,

maintain that the record keeping requirements are not burdensome and are rationally related to the state's interest in protecting its citizens.

I note that a similar record keeping and reporting provision was upheld in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1975). Danforth upheld a requirement in which forms were supplied to abortion facilities and physicians, requiring compilation of data relevant to maternal health and life. The information on the forms was to be kept confidential and was to be used only for statistical purposes. The court considered the requirements permissible, because the requirements were reasonably directed to the preservation of maternal health and respected a patient's privacy and confidentiality. Although the information gathered pursuant to § 3214 is open

to the public, I conclude that the requirements of confidentiality in § 3214(e) regarding the identity of both patient and physician prevent any invasion of privacy which could present a legally significant burden on the abortion decision.

In addition, record keeping of the kind expressed in § 3214 is related to the state's interest in protecting the health of its citizens. The information compiled, like that sought in Danforth, may be a resource that is relevant to "decisions involving medical experience and judgment." Id. at 81. Further, I note that the provision requiring complications to be reported will provide data on the occurrence of specific risks and allow the Commonwealth to identify those doctors and clinics whose patients have suffered an inordinate number of complications.

Thus, the reporting requirement is related to the state's interest in maternal health.

Consequently, I conclude the reporting and record keeping requirements do not create a legally significant burden on the abortion decision, and serve a legitimate state interest. For all these reasons and based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the reporting requirements are unconstitutional.

IX. HOSPITAL-ONLY REQUIREMENT FOR POST-FIRST TRIMESTER ABORTIONS - § 3209

Section 3209 of the Act provides that all abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital except in cases where a medical emergency exists.

Plaintiffs contend that this requirement effectively eliminates, for many women, the ability to exercise their fundamental right. The plaintiffs argue that if hospitals are unavailable to perform post-first trimester abortions, a government imposed hospitalization requirement may act as a governmental veto of a woman's decision to seek an abortion. Defendants contend that hospitalization in the second trimester promotes maternal health when all methods of second trimester abortions are

considered. The risk of death caused increases with each week of delay. Thus, they maintain the hospitalization requirement is rationally related to the s compelling interest in protecting the life and health of t women undergoing abortions in the second trimester.

Physicians are currently required by regulation to perform all post-first trimester abortions in a hos In 1981, 48 hospitals in Pennsylvania performed post- trimester abortions. (para. 179) Thus, all post-first trimester abortions currently are performed in hospitals. There is no evidence that this has had a legally significant woman's right to obtain an abortion. Section 3209 would simply continue the status quo.

The hospital-only requirement is reasonably related to the state's interest in maternal health during the

second trimester of pregnancy. It is the professional opinion of plaintiff physicians that it is medically safe to perform dilation and evacuation (D & E) abortions on an out-patient basis. (para. 180) However, according to current professional standards established by the American College of Obstetrics & Gynecology in its Manual of Standards for Obstetricians, Gynecological Survey 1982, D & E abortions should be performed only in an out-patient surgical facility. (para. 174) To qualify as an out-patient surgical facility, a facility must have anesthesia capability, operating room equipment and other backup care facilities. (para. 175) Most abortion clinics at present do not qualify as out-patient surgical facilities. (para. 176) Hospitals do qualify. Since § 3209 does not require admission to a hospital, it is satisfied

if a D & E is performed at a hospital on an outpatient basis.

In addition to a D & E, an abortion may be performed by a saline ammniocentesis, prostaglodin installation, hysterotomy. These involve serious surgical procedures. Plaintiffs do not suggest that any of these methods can or should be performed in any environment other than a hospital. Considering all possible second trimester abortion procedures (and the Act applies equally to all such procedures) I find that hospitalization in the second trimester promotes maternal health.

In Akron Center v. Akron, the Sixth Circuit upheld a requirement that every abortion subsequent to the end of the first trimester of pregnancy be performed in a hospital. The court concluded that the requirement furthered

the compelling state interest in protection of maternal health. 651 F.2d at 1210. On similar grounds the Eighth Circuit in PPA v. Ashcroft upheld a similar requirement that all second trimester abortions be performed in a hospital. 655 F.2d at 853.

For all these reasons, I conclude that § 3209 is consistent with the state's compelling interest in maternal health during the second trimester of pregnancy. Therefore, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the hospital-only requirement is unconstitutional.

X. CRIMINAL PENALTIES - § 3210(a)

Section 3210(a) provides that

> any person who intentionally, knowingly or recklessly performs or induces an abortion when the fetus is viable commits a felony of the third degree. It shall be a complete defense to any charge brought against a physician . . . that he had concluded in good faith, in his best medical judgment, that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

Plaintiffs challenge this provision on the basis that it establishes a legislative presumption that all post-viability abortions are criminal and places upon the defendant the burden of pleading and proving innocence.

I note that state regulation of fetal life after viability was expressly permitted in Roe v. Wade, 410 U.S. 113 (1973). In Roe v. Wade, the Supreme Court said that a state interested in

protecting fetal life after viability "may go so far as to prescribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-164.

With respect to the language of § 3210(a), I note that although the Act provides for criminal penalties for persons who "intentionally, knowingly or recklessly" perform abortions when the fetus is viable, the Act also provides for complete defenses to any criminal charges under § 3210(a) if the physician had concluded in good faith, in his best medical judgment, either that the unborn child was not viable at the time the abortion was performed or induced or that the abortion was necessary to preserve maternal life or health.

Plaintiffs' argument that § 3210(a) is unconstitutional because it requires the physician to plead and

prove his innocence is clearly erroneous based upon my reading of § 3210(a) and Ashcroft. In Ashcroft the Eighth Circuit upheld the provisions of a Missouri statute which provided criminal penalties for any person who knowingly performed an abortion upon a viable unborn child:

> As applied to the elements of this crime, the State would be required to provide that the physician was (1) aware he was performing an abortion; (2) aware this was a viable unborn child; and (3) aware the abortion was not necessary to preserve the life or health of the woman. When interpreted in this fashion, the statute does not impermissibly impinge on the rights of women and their physicians. It can be used to punish only those physicians who know that a fetus is viable and that the abortion is not necessary to the life and health of the woman. Such regulation is clearly permissible under Roe.

655 F.2d at 862 (emphasis in original). Similarly, § 3210(a) of the Act comes within the requirements of Roe v. Wade

and Ashcroft.

I conclude, therefore, that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the criminal penalties provision of the Act is unconstitutional.

XI. CHOICE OF ABORTION TECHNIQUE - § 3210(b)

Section 3210(b) provides with respect to abortions after viability that the physician must select the technique which provides "the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique."

Plaintiffs contend that this provision is unconst+tutionally vague. I disagree. None of the concepts would be foreign to the physicians upon whom the requirements of this section fall. Physicians are called upon daily to assess probabilities and degrees of risk whenever there are two or more

procedures from which they can chose to treat a patient. Section 3210(b) requires no more than the usual exercise of medical judgment.

I am also unpersuaded that an ambiguity exists between the terms born alive and viable which would lead physicians to use the mandated technique at an early stage of pregnancy. The caption of this section of the Act is "Abortion after viability." The provisions of this section clearly are only intended to apply after viability and not at the earlier stages hypothesized by the plaintiffs.

Plaintiffs also contend that this provision violates the substantive law enunciated in Roe v. Wade, 410 U.S. 113 (1973). The plaintiffs interpret the word "significantly" in the phrase "significantly greater risk" as being a

comparative term, indicative of degree. Thus, plaintiffs argue that this section requires a woman in the third trimester of pregnancy to accept some additional risk so long as it is not significant. The plaintiffs contend that this is inconsistent with Roe v. Wade which held that an abortion could not be prohibited even in the third trimester if necessary to preserve the health or life of the woman.

The court in Ashcroft upheld a provision similar to § 3210(b). The Ashcroft court stated:

> If the risk to the woman from the 'fetal survival method' is greater than the risk to her from alternative methods, the physician may choose an alternative. Implicitly, if the risk to the woman from the fetal survival method

> is less than or equal to the risk to her from available alternative methods, the physician must use the fetal survival method. Given the precision of this balance, the question is not whether the statute is vague, but whether the woman's constitutional rights are violated by a requirement that a fetal survival method must be used whenever the risks to the woman with that method are less than or equal to the risk from other possible methods.
>
> . . .
>
> By definition, if the risk is absolutely equal, the life and health of the mother are subjected to no greater risk by requiring use of the fetal survival method. By requiring use of such a method when the risks from it are less than or equal to the risk of alternatives, Missouri is within permissible bounds of regulation.

655 F.2d at 863 (footnotes omitted). The provision in Ashcroft, however, required the choice of a technique most likely to preserve the life of the fetus only when risk to the woman was no greater than the risk from another technique. Plaintiffs distinguish

Ashcroft contending that the Pennsylvania Act requires women to accept a slightly higher risk or somewhat higher risk while the statute in Ashcroft imposed no greater risk.

If "significantly greater risk" means that some additional risk must be accepted by the woman, I might be persuaded that the right recognized in Roe has been violated. After viability, Roe v. Wade permits a state to prohibit abortion except those abortions necessary to preserve the life or health of the woman. Thus, after viability, Roe v. Wade recognizes a class of abortions, those necessary to preserve the woman's life or health that are still entitled to a degree of protection. If § 3210(b) does impose some additional risk, as plaintiffs contend, then it burdens this group of post-viability abortions which are

entitled to some degree of protection as well as those post-viability abortions which the state could prohibit completely.

The plaintiffs' error is in their interpretation of the word "significantly" as used in § 3210(b). I am obliged to give the statute that reasonable interpretation which avoids the danger of constitutional invalidity. United States v. Harris, 347 U.S. 612 (1954); Planned Parenthood Association v. Ashcroft, 483 F. Supp. 679, 684 (W.D. Mo. 1980). I conclude that the phrase "significantly greater risk," reasonably interpreted, is not distinguishable from the statutory language in Ashcroft.

The reasonable interpretation of the term "significantly greater risk" which is consistent with constitutionality is that it is not a statement of

degree of risk. Significant can be understood to mean measurable or worthy or not worthy of consideration in contrast with insignificant, or not measureable or not worthy of consideration. Websters' Third New International Dictionary defines significant as "having meaning," "having or likely to have influence or effect," and "probably caused by something other than chance." When significant is defined in this way, the term "significantly greater risk" means any meaningful risk or any risk which would influence the exercise of medical judgment. Thus, the Act requires that after viability, the physician select the technique most likely to result in the live abortion of the viable fetus so long as there is no additional risk to the woman. So interpreted, the statute is constitutional for the reasons stated

by the court in Ashcroft. For all these reasons and based on the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the choice of technique provision in § 3210(b) is unconstitutional.

XII. SECOND-DOCTOR REQUIREMENT - § 3210(c)

Section 3210(c) provides, in pertinent part, that "[a]ny person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician."

Plaintiffs maintain that the second-doctor requirement will increase the cost and decrease the availability of some abortions. Plaintiffs also maintain that the provision is void for vagueness, in that it fails to give physicians the guidance necessary to enable them to conform their conduct to law. Additionally, plaintiffs maintain that § 3210(c) is overbroad, in that it requires the presence of a second

physician any time there is even a slight chance of a live birth. Consequently, plaintiffs assert that the requirement imposes a legally significant burden on a fundamental right and can be sustained only if it is necessary to further a compelling state interest.

The defendants, on the other hand, maintain that any increase in the cost of abortion procedures as a result of the second-doctor requirement does not constitute a legally significant burden on the abortion decision. They further argue that § 3210(c) gives physicians fair notice as to when a second physician must be present and is narrowly drawn to apply only where a child may survive the abortion procedure.

I conclude that § 3210(c) is not vague or overbroad. The language "the possibility of the child surviving the

abortion," is sufficiently precise to afford the physicians guidance as to when a second physician is required. Section 3210(c) is distinguishable from a provision found objectionable in the Ashcroft case. Ashcroft invalidated a provision requiring a second physician to be present at the abortion of a viable unborn child to provide immediate care for the child. Ashcroft found the act overbroad, because it required a second physician even when the abortion was performed by means of the dilation and evacuation method, which method precludes survival of a viable fetus.

Section 3210(c), however, requires a second physician only when there is a possibility of the child surviving the abortion. Thus, a second physician would not be required where the means used to perform the abortion precludes survival by a viable fetus.

Section 3210(c), therefore, overcomes the overbreadth objection in Ashcroft.

There is no evidence that if this provision would cause the cost of an abortion to increase or that the increase would be so substantial that it would affect a woman's exercise of her right.

In addition, because the requirement applies only when there is a possibility that the child would survive the abortion, a compelling state interest in the life of a viable fetus justifies some additional cost which might result from the presence of the second doctor.

Consequently, I conclude that § 3210(c) is reasonably related to a compelling state interest and is not vague or overly broad.

Therefore, for all these reasons and based upon the record produced

before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the second-doctor requirement is unconstitutional.

XIII. INSURANCE COVERAGE FOR ABORTIONS - § 3215(3)

Section 3215(e) states that all insurers who make available health care and disability insurance policies in this Commonwealth shall make available policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest as well as policies containing comprehensive abortion coverage. The policies containing limited coverage must carry a premium which is lower than that which is contained in policies offering additional abortion coverage.

Plaintiffs challenge this section alleging that it requires higher premiums for policies containing comprehensive abortion coverage than for policies which contain only limited abortion coverage. Plaintiffs argue

that the section is a departure from the current law of Pennsylvania which mandates actuarial soundness in insurance rates. Defendants argue that the Act bears a rational relationship to the legitimate governmental interest of encouraging childbirth over abortion.

There are a number of factors which will influence the cost to the insurer of providing the two different kinds of abortion coverage. Such factors include the social, economic and religious characteristics of the population from which the insurer typically obtains its policyholders, the type of abortion technique typically used, the relative cost of maternity benefits as compared with abortions, the number of pregnancies in the population which are carried to full term, and the manner in which the coverage is sold. (para. 190)

The parties have stipulated that the cost to an insurer of providing a health insurance policy which covers abortion only in cases of threatened maternal death, rape or incest may be either higher or lower than the cost to the insurer of providing a health insurance policy which covers abortion comprehensively. (para. 189) This stipulation does not satisfy the plaintiffs' burden.

There is no evidence that the cost of health insurance offering only limited abortion coverage would actually be higher than comprehensive abortion coverage. There is no evidence that the state is arbitrarily requiring plaintiffs purchasing comprehensive abortion coverage to pay more or to pay a cost unrelated to the service they are being provided. There is no evidence that offering limited abortion coverage

at less than comprehensive coverage beyond what comprehensive coverage cost before the new Act. Even if there were an increased financial cost, there is no evidence that it would not be justified by an increased risk of claims.

Plaintiff have failed to demonstrate that § 3215(e) is a legally significant burden on a woman's privacy right to seek an abortion. The limitation of insurance coverage does not itself affect the abortion decision or its effectuation. Insurance coverage merely affects the source of payment. Full abortion coverage still may be purchased. Even assuming that increased insurance cost could constitute a legally significant burden, there is no evidence in this record that § 3215(e) will require purchasers of comprehensive coverage to pay more after the Act than they paid before the Act.

Section 3215(e) is rationally related to the public policy of the Commonwealth encouraging childbirth over abortion. In Maher v. Roe, 432 U.S. 464, 474 (1977), the Supreme Court held that a state may pass laws and regulations to further a state policy favoring childbirth over abortion where the state's action does not unduly burden the woman's right of privacy. Requiring insurers to offer a lower-priced policy containing an only limited coverage for abortion services is rationally related to the state policy favoring childbirth. It ensures that opponents of abortion will not be required to purchase coverage which they would not desire to use. It is consistent with the state policy favoring childbirth to provide this choice of coverage to the Commonwealth citizen.

Therefore based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the insurance coverage provision is unconstitutional.

XIV. OSTEOPATHS-§3203

Section 3203 defines "physician," as "any person licensed to practice medicine in this Commonwealth." The plaintiffs challenge this definition as depriving osteopaths of equal protection of the law. They maintain that this definition conflicts with the definition of "physician" in 1 Pa. Con. Stat. Ann. § 1991, defining physician as "an individual licensed under the laws of this Commonwealth to engage in the practice of medicine and surgery . . ., or in the practice of osteopathy or osteopathic surgery." The plaintiffs note that state law dictates that when two definitions are different and irreconcilable, the "statute latest in date of final enactment shall prevail." Id. § 1936. Since the Pennsylvania Abortion Control Act makes no reference to those who are licensed to practice

osteopathy, plaintiffs argue that the Act must be construed to apply only to medical doctors. Such exclusion of osteopaths, plaintiffs maintain, is arbitrary and irrational and violative of the Equal Protection Clause.

In analyzing plaintiffs' challenge, I note that a statute should be construed, if possible, to pretermit constitutional objections. See United States v. Clark, 445 U.S. 23 (1980), 2A Sands, Sutherland Statutory Construction § 45.11 (1973). Further, Pennsylvania law provides that, in determining legislative intent, it is presumed that the General Assembly intended that its acts be construed as consistent with the United States Constitution. 1 Pa. Cons. Stat. § 1922(3).

Regarding the specific language of the Act, I note that the term "medicine" is not defined in the Act.

The Statutory Construction Act, however, provides that "medicine and surgery", unless otherwise provided by law, is "[t]he art and science having for their object the cure of diseases of and the preservation of the health of man, including all practice of the healing art with or without drugs." Id. § 1991. I find that osteopaths are trained in a manner which qualifies them, upon proper licensing, to cure disease and perform such acts as are necessary to preserve and protect health. (para. 2, Affidavit Nos. 3, 6) Further, I note that the definition of "medicine and surgery" contained in the Statutory Construction Act is virtually identical to the definition of "osteopathic medicine and surgery" contained in the Osteopathic Medical Practice Act. See Pa. Stat. Ann. tit. 63, § 271.2.

In addition, I note that the legislature refers in the Act to the State Board of Medical Education and Licensure, which regulates medical doctors only. This reference does not affect the constitutionality of the Act, however. The General Assembly may have intended to modify the Board's powers. Alternatively, it may be necessary for the legislature to clarify its intent with regard to the enforcement mechanism. Nevertheless, the reference to enforcement by a body with authority over only one group of physicians does not lead to a conclusion that only the regulated group may perform abortions. The reference to the State Board of Medical Education and Licensure, therefore, does not render osteopaths unable to perform abortions.

Thus, based on the present record, it appears that osteopaths were

intended by the legislature to be included within the definition of "physician."

Therefore, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claim that the Act is unconstitutional because § 3203 does not specifically mention osteopaths.

XV. OTHER PROVISIONS - ACT AS A WHOLE

Plaintiffs challenge other provisions in their brief which were not addressed at oral argument. Plaintiffs also present in their brief challenges to the Act as a whole which were not argued. I shall address briefly each of these arguments.

Plaintiffs contend that the definition of "abortion" contained in § 3203 of the Act is void for vagueness. I find that this contention lacks merit because it misconstrues the Act's definition of abortion and ignores the decisional law which has developed in this area of law. I have considered the cases cited by the parties, and for the reasons stated in defendant's brief at 16 - 24, I find that the definition of "abortion" in the Act is sufficient to give those affected by its terms notice of the conduct which is prohibited.

Plaintiffs attack §§ 3202(d) and 3213(d) of the Act on the grounds that they violate the religious freedom guaranteed by the first amendment. I conclude that this argument is without merit. The claim does no more than state an establishment clause challenge which has been rejected by the courts. Merely because a statute has an underlying purpose which coincides with the tenets of a particular religion does not mean that the statute violates the establishment clause. While the law generally provides accommodations for religious objections to medical care, no portion of the Act compels that particular medical care be provided. These sections which state that persons who, as a matter of conscience, refuse to participate in abortions may not be penalized for that refusal merely implement the constitutional protection

of the free exercise clause. The Act does not discriminate among religions simply because it takes measures, within the state's power, to regulate the practice of abortion.

In addition to challenging sections of the Act individually, plaintiffs argue that the Act is unconstitutional in its entirety. They contend that this is true because it imposes regulations on abortion procedures which are not imposed on other surgical procedures. In making this argument, plaintiffs ignore both specific precedent permitting regulation of abortion procedures and the historic power of the state to regulate the medical and other professions in the interest of public health. I find plaintiffs' argument to be without merit. It ignores both the special nature of abortion and the decisional

law in this area.

For all these reasons, for the reasons stated by the defendants in their memorandum of law, and based upon the record produced before me, I conclude that the plaintiffs have failed to show a likelihood of success on the merits of their claims that the Act as whole, and §§ 3203, 3202(d), and 3213(d) of the Act are unconstitutional.

XVI. CONCLUSION

I have applied the traditional criteria applicable to a motion for preliminary injunction: likelihood of success on the merits, irreparable harm if the relief is not granted, possibility of harm to the non-moving party, and where relevant, harm to the public. Given the importance of the right involved in this litigation, I have assumed that if the plaintiffs were able to show likelihood of success on the merits, then the irreparable harm requirement would be met. I conclude that in only one instance, the 24-hour waiting period, did the plaintiffs carry their burden of demonstrating likelihood of success on the merits.

With respect to each separate issue, I have considered the rights of the non-moving party. Where the plaintiffs failed to demonstrate

likelihood of success on the merits, respect for the democratic process which the defendants serve and which produced the Act was a strong, additional factor in favor of denying plaintiffs' motion. Where plaintiffs demonstrated likelihood of success on the merits, the rights of the non-moving party were overcome by the possibility of irreparable harm to a fundamental constitutional right. In addition to the rights of the non-moving party, I have considered the public interest. Since the public has an interest in respect both for fundamental individual rights and for the legislative process, public interest favored a resolution consistent with my decision on the likelihood of success.

My adjudication is limited to the plaintiffs' request for a preliminary injunction. It is circumscribed by the record produced by the parties and the

arguments advanced in the briefs on this motion. After applying the criteria for a preliminary injunction, I conclude that the only portion of the Act which the plaintiffs have demonstrated should be preliminarily enjoined is the 24-hour waiting period. In all other respects, the plaintiffs have failed to show a right to a preliminary injunction pending the outcome of the trial on the merits.

/s/ Daniel H. Huyett, 3d
Daniel H. Huyett, 3d, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN COLLEGE OF OBSTETRICIANS AND AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.	:	NO. 82-4336
	:	CIVIL ACTION
V. THORNBURGH, et al.	:	

O R D E R

NOW, November 18, 1982, IT IS ORDERED that a preliminary injunction hearing shall be held at 10:00 a.m. on December 2, 1982, Courtroom 12-A, U. S. Courthouse, Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that:

1. FAILURE OF COUNSEL OR A PARTY TO COMPLY WITH ANY OF THE PROVISIONS OF THIS ORDER MAY RESULT IN DISMISSAL, DEFAULT, CONTEMPT, OR SANCTIONS AS MAY BE APPROPRIATE, INCLUDING THE AWARD OF REASONABLE EXPENSES AND COUNSEL FEES.

2. For the purposes of the preliminary injunction hearing, counsel for the parties shall meet and prepare a

complete and comprehensive stipulation of uncontested facts pursuant to paragraph (d)2(b)(2) of Local Rule of Civil Procedure 21. The parties shall reach agreement on all uncontested facts even though relevancy may be disputed. Such stipulation shall be submitted to the Court (chambers, room 12614) in an original and two (2) copies for approval not later than noon, November 30, 1982.

3. For the purposes of this preliminary injunction hearing, counsel for the parties shall meet and prepare a complete comprehensive statement of contested facts. The parties shall set forth each contested fact followed by their respective versions as to that fact. In addition, no party may contest a fact unless it is prepared to present evidence regarding that fact at the preliminary hearing. The statement of contested facts and the parties'

versions of the contested facts shall be submitted to the Court (chambers, room 12614) in an original and two (2) copies for approval not later than noon, November 30, 1982, along with the stipulation of all uncontested facts required in para. 1 above.

4. For the purposes of this preliminary injunction hearing, the parties shall submit to chambers not later than noon, November 30, 1982, in an original and two (2) copies, proposed findings of fact and conclusions of law.

5. Not later than noon, November 30, 1982, each party shall submit to the Court (chambers, room 12614) in an original and two (2) copies for approval a list of the names and addresses of all witnesses the party intends to call at the hearing. Each witness shall be identified and there shall be a brief statement of the

evidence the witness will present. In addition, a detailed summary of the qualifications of each expert witness shall be submitted.

6. All exhibits which the parties shall present at the hearing shall be shown to the other party prior to the hearing and shall be numbered in advance of the hearing; the Court at the hearing shall be supplied with copies of each exhibit in duplicate; each party shall prepare and submit to the Court at the commencement of the hearing a schedule in triplicate of such exhibits containing the number and a brief description of each exhibit; paragraph (d) 2(b)(6) of Local Rule of Civil Procedure 21 shall be complied with generally in respect to exhibits.

7. Counsel shall become familiar with and comply with "Procedures which shall govern in the Trial of cases

before Judge Daniel H. Huyett, 3rd."

8. Counsel shall become familiar with Local Rule of Civil Procedure 21 and follow generally the provisions of that Rule in respect to the hearing.

9. A procedural conference shall be held in chambers on December 1, 1982 at 1:30 p.m.

/s/ Daniel H. Huyett, 3rd
Daniel H. Huyett, 3rd, Judge

NOTE: ATTACHED ARE COPIES OF JUDGE HUYETT'S TRIAL PROCEDURES.

The severability clause of the Act provides as follows:

> The provisions of this act shall be severable. If any provision of this act, or the application thereof tc any person or circumstance, is held invalid, the remainder of this act, and the application of any provision hereof to any other persons of circumstances, shall not be affected thereby.

Act No. 1982-138, §5, 1982 Pa. Legis. Serv. 750, 794 (Purdon).